

September 10, 2010

**MEMORANDUM TO:** Paul Piquado  
Acting Deputy Assistant Secretary  
for Import Administration

**FROM:** Susan H. Kuhbach  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**SUBJECT:** Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Issues and Decision Memorandum for the Final Determination

## SUMMARY

The Department of Commerce (the "Department") has analyzed the case and rebuttal briefs submitted by interested parties in the above-referenced investigation. As a result of our analysis, we have made changes in the margin calculation for the final determination. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

## Background

On April 28, 2010, the Department published its affirmative Preliminary Determination in the investigation of certain seamless carbon and alloy steel standard, line, and pressure pipe from the People's Republic of China ("PRC"), which was amended on May 28, 2010.<sup>1</sup> We invited parties to comment on our Preliminary Determination and Amended Preliminary Determination. Petitioners<sup>2</sup> and Tianjin Pipe (Group) Corporation, and Tianjin Pipe International Economic and

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<sup>1</sup> See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances, in Part, and Postponement of Final Determination, 75 FR 22372 (April 28, 2010) ("Preliminary Determination"), and Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Amended Preliminary Determination of Sales at Less Than Fair Value, 75 FR 29972 (May 28, 2010) ("Amended Preliminary Determination").

<sup>2</sup> Petitioners in this investigation are United States Steel Corporation and V&M Star L.P. TMK IPSCO and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union also entered the proceeding as petitioners (collectively with United States Steel Corporation and V&M Star L.P., "Petitioners").

Trading Corporation (collectively, “TPCO”), and Hengyang Steel Tube Group Int’l Trading Inc. (“Hengyang”), the mandatory respondents in this investigation, submitted case briefs on July 14, 2010. Petitioners and Hengyang submitted rebuttal briefs on July 21, 2010, and TPCO’s rebuttal brief was resubmitted on July 26, 2010.

Below is the complete list of the issues in this antidumping duty (“AD”) investigation for which we received comments.

## **LIST OF THE ISSUES**

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- Comment 2: Double Remedy
- Comment 3: Zeroing
- Comment 4: Whether to Deduct PRC Value Added Tax (“VAT”) from U.S. Price

### **II. Surrogate Values**

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- Comment 7: The Appropriate Surrogate Value for Steel Billets
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- Comment 10: The Appropriate Surrogate Value for Oxygen and Nitrogen
- Comment 11: The Appropriate Surrogate Value for Medium Chromium
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### **III. TPCO-Specific Issues**

- Comment 16: Whether to Apply AFA (“AFA”) Because of Errors in the Factors of Production (“FOP”) Database
- Comment 17: Whether TPCO is Affiliated with One of its U.S. Customers and Whether AFA or Partial AFA Should be Applied Because of Unreported Downstream Sales
- Comment 18: Whether Targeted Dumping Exists
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- Comment 21: Calculating Freight Expenses for Transporting Pipe for Further Processing
- Comment 22: Whether Certain Materials are Inputs or Overhead
- Comment 23: Whether to Deduct Domestic Inland Insurance from the U.S. Price
- Comment 24: Whether to Correct the Conversion Factor for Argon
- Comment 25: Whether to Calculate a Factor for Pipeline Transmission

Comment 26: Whether to Disallow a By-Product Offset for Electricity  
Comment 27: Whether to Apply Partial AFA to Unreported Steel Strap  
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Comment 29: Whether to Deduct Unreported Stevedoring Expenses from the U.S. Price  
Comment 30: Whether the 33 Percent Threshold Test is Appropriate When Deciding to Use  
ME Purchase Prices  
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Comment 39: Application of Certain Adjustment to the Factors for Sintered Iron Ore  
Comment 40: Critical Circumstances

### **DISCUSSION OF THE ISSUES**

#### **General Issues:**

##### **Comment 1: Scope Issues**

- Salem Steel North America LLC (Salem), as U.S. importer of seamless mechanical tubing, contends that mechanical tubing, including aviation, hydraulic and bearing tubing, should be excluded from the scope because (1) the Petitioners do not produce these products and never intended that the investigation cover these products; and (2) these are custom products made to strict engineering standards and not made according to standard pipe sizes, unlike seamless pipe which is a commodity product made to less strict engineering requirements and made only in certain standard sizes. Salem adds that aviation, hydraulic and bearing tubing are a type of mechanical tubing, thus if mechanical tubing is excluded from the scope, aviation, hydraulic and bearing tubing must also be excluded from the scope.
- According to Salem, Petitioners' concerns regarding circumvention should not lead to including products within the scope that Petitioners intentionally excluded from the scope. Salem states that importers are willing to submit to testing by CBP to ensure that imported products identified as mechanical tubing were produced to mechanical tubing specifications. Additionally, Salem states that the Department and CBP could require written evidence that the products have been tested and found to conform to the stated specifications.

- Salem maintains that including products within the scope that Petitioners intended to exclude could raise questions in the International Trade Commission's ("ITC") proceeding.
- Salem suggests the following possibilities for exclusionary language in the scope: (1) adopt the scope language in the petition; (2) state that "All mechanical, boiler, hydraulic, aviation, bearing, condenser and heat exchange tubing are excluded from the scope of this investigation, except for such products described above when they conform to the dimensional requirements, i.e., outside diameter and wall thickness of ASTM A-53, ASTM A-106 or API 5L"; or (3) state that "Specifically excluded from the scope of the investigation are:
  - Boiler tubing and mechanical tubing, if such products are not produced to ASTM A-53, ASTM A-106, ASTM A-333, ASTM A-334, ASTM A-335, ASTM A-589, ASTM A-795, and API 5L specifications and are not used in standard, line, or pressure pipe applications;
  - Mechanical tubing that conforms to the A-519 standard for cold-drawn seamless tubing that is not produced to the specific commodity specifications of seamless pipe;
  - Seamless aviation tubing conforming to AMS-T-6736A and AMS 2253E specifications;
  - Seamless hydraulic tubing conforming to SAE J524 specifications; and,
  - Seamless bearing tubing conforming to ASTM A295, AMS 6440, and AMS 2253E specifications.
- Toyota Tsusho America, Inc. ("TAI"), a U.S. importer of mechanical tubing, argues that the Department should exclude from the scope of the investigation all seven types of tubing products (i.e., mechanical, boiler, bearing, condenser, heat exchange, hydraulic, and aviation) *whether or not* they overlap with the dimensional requirements of certain seamless pipe because the ITC has specifically excluded these products from its final investigation and is not determining whether the U.S. tube-producing industry is being materially injured by imports of tubing. TAI asserts that the Department cannot enlarge the scope of its investigation because the statute requires the Department and the ITC to reach determinations regarding the same kind of merchandise and there is no evidence on the record that tubing products are the same class or kind of merchandise as seamless pipe.
- TAI maintains that the record contains substantial information indicating that mechanical tubing and the different subclasses of mechanical tubing (e.g., aviation, hydraulic, bearing) are different from the subject merchandise and should be excluded from the scope of the investigation.
- TAI notes that Petitioners expressly excluded mechanical and boiler tubing products from the scope of the investigation except when they were produced to seamless pipe specifications and used in seamless pipe applications. TAI states that

Petitioners also noted before the ITC that they “never intended that the scope of these investigations include any imports used as mechanical tubing.”<sup>3</sup> Thus, TAI believes that Petitioners should not oppose excluding other special types of mechanical tubing (e.g., bearing tubing) from the scope of the investigation. TAI adds that Petitioners have not opposed any of the scope modifications involving excluding mechanical tubing proposed by interested parties in this investigation.

- TAI also states that it does not object to excluding ASTM A-335 pipe from the scope of this investigation.
- MC Tubular Products, Inc. (“MC Tubular”), an importer of subject merchandise, contends that the Department should exclude from the scope of the investigation all mechanical, boiler, hydraulic, bearing, condenser, and heat exchange tubing notwithstanding any overlap of these products with the dimensional requirements of certain seamless pipe. Even if these products overlap with the dimensional requirements of seamless pipe, MC Tubular argues they still differ from subject merchandise in other respects and should be excluded from the scope of the investigation. MC Tubular states that these products must meet more rigorous requirements (e.g., surface condition requirements) and tighter tolerances than seamless pipe. According to MC Tubular, the Department’s proposed scope modification ignores these important physical differences.
- MC Tubular notes that the Petitioners have stated before the ITC that they never intended to include in the scope of the investigation any imports used as mechanical tubing.
- Since the ITC has excluded mechanical, boiler, hydraulic, bearing, condenser and heat exchange tubing from the scope of its investigation, MC Tubular contends that the Department must do the same to eliminate any doubt as to the validity of the ITC’s final injury determination. MC Tubular notes that the ITC has instructed parties to only report data for products that are used in seamless pipe applications and that meet the dimensional requirements of ASTM A-53, API-5L, and ASM A-106.
- Should the Department only exclude the tubing at issue if it does not meet certain seamless pipe dimensional requirements, MC Tubular requests that the Department identify which edition of the specifications should be used to determine whether there is an overlap in dimensional requirements between the tubing and seamless pipe. Specifically, MC Tubular requests that parties be allowed to use the edition of the specification they use in the normal course of business for purposes of determining whether the merchandise is subject or non-subject merchandise.

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<sup>3</sup> See letter from Toyota Tsusho America, Inc. regarding, “Antidumping Duty Investigation: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China: Case Brief,” dated July 14, 2010 at 4 quoting Petitioners’ letter to the Department amending Volume I of the Petitions filed on September 16, 2009, dated September 29, 2009.

- Petitioners argue that MC Tubular has failed to explain or provide support for questioning the validity of the ITC's final determination based on differences between the Department's definition of subject merchandise and the ITC's definition of like product. Petitioners point out that the ITC's instructions to parties regarding the products for which data should be reported is merely a starting point in defining like product and does not indicate that the ITC's like product definition will not be co-extensive with the Department's definition of subject merchandise. Nonetheless, Petitioners maintain that legally, the ITC's definition of like product does not have to correspond to the Department's definition of subject merchandise.<sup>4</sup>

### **Department's Position:**

We agree with the importers, in part, and have modified the scope of the investigation. The record of this investigation indicates that mechanical, boiler, condenser, heat exchange, aviation, hydraulic, and bearing tubing (the tubing at issue) differ from seamless standard, line, and/or pressure pipes in that seamless pipes are commodity products made to standard pipe sizes (outside diameter and wall thickness) whereas, the tubing at issue is custom designed to meet a customer's needs and is generally not produced with the standard pipe diameters and wall thicknesses found in seamless standard, line, and pressure pipes. Thus, generally the physical characteristics of the tubing distinguish the product from seamless standard, line, and pressure pipes. However, this is not the case where certain tubing at issue conforms to the dimensional requirements, *i.e.*, outside diameter and wall thickness, of seamless pipe specifications. Such a scenario raises questions as to whether the product is sufficiently distinct from seamless standard, line, and pressure pipes to be excluded from the scope of the investigation. Our concerns over dimensional requirements overlap primarily involve mechanical, boiler, condenser and heat exchange tubing. Thus, we have excluded from the scope of the investigation all mechanical, boiler, condenser, and heat exchange tubing, except when such products conform to the dimensional requirements, *i.e.*, outside diameter and wall thickness of ASTM A-53, ASTM A-106 or API 5L specifications. We have also excluded from the scope of the investigation all pipes meeting aerospace, hydraulic, and bearing tubing specifications. We have determined that the specifications of these products sufficiently distinguish them from subject merchandise and thus we have excluded them from the scope of the investigation. Moreover, the tight dimensional requirements of aerospace and hydraulic specifications and the high carbon content of bearing tubing distinguish these products from subject merchandise and make it unnecessary to limit the exclusion of these products to only those products that do not conform to the dimensional requirements, *i.e.*, outside diameter and wall thickness of ASTM A-53, ASTM A-106 or API 5L specifications. Lastly, based on Petitioners' request, we have excluded from the scope of the investigation all pipes meeting the chemical requirements of ASTM A-335, whether finished or unfinished.

### **Comment 2: Double Remedy**

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<sup>4</sup> See Certain Steel Wire Rod from Canada, Germany, Trinidad & Tobago, and Venezuela, USITC Pub 3075, Inv. Nos. 701-TA-368-371 (Final) (November 1997) at 6-7; Hoseiden Corp. v. United States, 85 F.3d 1561 (Fed. Cir. 1996).

- Hengyang, TPCO, and the Government of China (“GOC”) argue that the Department must take action to avoid the double remedy that results from the simultaneous application of countervailing duties and antidumping duties determined under the NME methodology.
- Hengyang, citing GPX, contends that the Department violated the law by making no accommodation for the application of AD and countervailing duty (“CVD”) in this proceeding because the CIT found that “{i}f Commerce is to apply CVD remedies where it also utilizes NME AD methodology, Commerce must adopt additional policies and procedures for its NME AD and CVD methodologies to account for the imposition of the CVD law to products from an NME country and avoid to the extent possible double counting of duties.”
- Accordingly, Hengyang argues that the Department must revisit its calculation methodologies to ensure that it has not imposed an unlawful remedy by double counting duties.
- TPCO contends that it must be determined whether the Department has the authority to apply the CVD law against imports from China while simultaneously treating China as a NME for purposes of antidumping.
- TPCO maintains that the double-remedy problem arises because in the application of simultaneous AD and CVD remedies involving NME countries, both remedies address the same underlying problem: distortion of market prices from government influence. According to TPCO, the self-correcting mechanisms that prevent a double remedy for domestic subsidies when the normal ME AD methodology is used do not exist when the special NME AD methodology is used, because under its NME methodology, the Department does not utilize either actual sales prices in China or the PRC producer's actual costs, i.e., the elements that might have been distorted by the domestic subsidy.
- Citing Coated Free Sheet from the PRC and the Lined Paper from the PRC, TPCO argues that the combined application of CVD and AD duties calculated using the NME methodology will always result in the double counting of remedies because, while the Department finds the PRC economy to be market oriented for purposes of evaluating potential countervailable subsidies, it does not find similarly for purposes of determining NV (“NV”) in an AD investigation.
- TPCO adds that when the Department restates the PRC producer's costs using SVs, Congress has explicitly instructed the Department to use only SVs that are subsidy free, such that the NME NV has been constructed in a way specifically designed to eliminate any distortions due to government interventions and/or subsidies in the NME. TPCO states that double remedy results because the Department both measures the alleged subsidy benefit with reference to market benchmarks (including third country prices) and at the same time measures dumping by using a FOP analysis based on third-country

prices for many of the very same inputs. According to TPCO, PRC producers are, therefore, being taxed twice, in the form of overlapping AD and CVD duties for the same purported offense: that the price they pay for certain inputs are purportedly not market determined.

- TPCO submits that while both remedies address different types of behavior, in that the AD law offsets unfairly low prices in the U.S. market and the CVD law offsets unfair economic advantage bestowed by a government, however manifested, whether in price, production cost, or some other competitive benefit, the Tariff Act of 1930, as amended, (the “Act”) provides safeguards to prevent the threat of overlapping remedies when the AD and CVD laws are applied in tandem.
- TPCO maintains that when the United States imposes a CVD in the amount of the export subsidy, it fully corrects for the subsidy. TPCO adds that imposition of antidumping duties in addition to CVD would double the corrective penalty. According to TPCO, section 772(c)(1)(C) of the Act explicitly prohibits such a double remedy when it provides for an adjustment to the EP in the dumping calculation by adding the amount of any CVD attributed to export subsidies. Further, TPCO claims that the Department has explained that if the Department finds that a respondent received the benefits of an export subsidy program, it is presumed the subsidy contributed to lower-priced sales of subject merchandise in the United States market by the amount of any such export subsidy. Thus, citing Certain Cold-Rolled Carbon Steel Flat Products from Korea, TPCO asserts that the subsidy and dumping are presumed to be related, and the assessment of duties against both would in effect be “double application” or imposing two duties against the same situation.<sup>5</sup>
- TPCO claims that in ME AD cases, there is also no double-remedy problem for domestic subsidies because the respondent's own prices and costs (which reflect the domestic subsidies) are utilized in the AD margin calculation. TPCO argues that in competitive markets, the domestic subsidy will lower prices in both the export and domestic markets; therefore, where there are domestic subsidies in an ME case, there is no double remedy if the United States levies both AD and CVD duties on imports of the product.
- TPCO argues that the self correcting mechanisms that prevent double-remedy penalties for domestic subsidies when the ME AD methodology is used do not exist when the NME AD methodology is used, because the Department does not use either actual sales prices in China or the PRC producer's actual costs. TPCO further states that when the Department restates the PRC producer's costs, Congress has explicitly instructed the Department to use only SVs that are subsidy free, so that the NV is constructed in a way specifically designed to eliminate any distortions due to government interventions and/or subsidies in the NME. According to TPCO, this punishes PRC companies twice for the same allegedly “unfair” trading practice: first for the CVD to offset the alleged subsidy, and second, when the allegedly subsidized EP is compared to a non-subsidized

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<sup>5</sup> See Certain Cold-Rolled Carbon Steel Flat Products from Korea: Notice of Final Determination of Sales at Less Than Fair Value, 67 FR 62124, 62125 (October 3, 2002) (“Cold-Rolled Steel from Korea”).



constructed NV. TPCO maintains that double remedies result because the Department measures the alleged subsidy benefit with reference to market benchmarks, while at the same time measures dumping by using a FOP analysis based on third-country prices for many of the very same inputs.

- TPCO states that the primary subsidy found by the Department in its companion CVD case was because TPCO's actual steel billet purchases were at prices "less than adequate remuneration," whereupon the Department imposed a CVD duty that equaled the difference between TPCO's actual steel billet purchase prices and a "world market price" for steel billets. However, TPCO argues that in the instant investigation, under its NME methodology, the Department ignores TPCO's actual purchased steel billet cost, and instead substitutes a SV for TPCO's purchased steel billet cost, and to the extent that this SV is higher than TPCO's actual cost of purchased steel billets, the AD duties will offset the same alleged unfair advantage of low-cost purchased steel billets.
- TPCO suggests that in previous cases in which the double-counting issue has been raised, the Department has provided two principal responses to respondent's arguments: first, the Department stated its economic conclusion that there is no basis to presume that domestic subsidies in fact lower EPs, and second, the Department has stated its evidentiary conclusion that respondents had not sufficiently demonstrated that there was actual double counting of remedies. TPCO argues that each of these conclusions is wrong.
- TPCO claims that the Department has in prior cases concluded that "whereas the connection between export subsidies and EPs is direct, the connection between domestic subsidies and EPs is indirect . . . ." TPCO argues that there is no economic justification for the Department to conclude that the seamless pipe producer will always choose to keep 100 percent of the benefit conveyed via a domestic subsidy, but will choose to give up 100 percent of the benefit through a lower price if the benefit is conveyed via an export subsidy. Moreover, citing Low Enriched Uranium from France, TPCO contends that this Department economic conclusion is inconsistent with the Department's own previous economic analysis in which the Department ruled that "domestic subsidies presumably lower the price of the subject merchandise both in the home and the U.S. markets, and therefore has no effect on the measurement of any dumping that might also occur."<sup>6</sup> TPCO says that, in that same case, the Department also stated that "domestic subsidies are assumed not to affect dumping margins, because they lower prices in both the U.S. and the domestic market of the exporting country equally."<sup>7</sup> TPCO submits that these conclusions cannot be reconciled with the Department's current position concerning the double counting issue. In addition, TPCO claims that the Department's distinction between the economic effects of export subsidies and domestic subsidies is legally irrelevant because the Act, requiring that the Department assess a CVD "equal to the amount of the net countervailable subsidy," assumes complete pass through.

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<sup>6</sup> See Low Enriched Uranium from France, 69 FR 46501,46506 (August 3, 2004).

<sup>7</sup> Id.

- TPCO asserts that the problem of double-remedy of CVD and AD duties is already fully recognized in the law for export subsidies where, because the Department assumes that the full amount of the export subsidy is used by the exporter to lower its price to the U.S. market, the Department undertakes an adjustment to the AD calculation to reflect the full amount of the export subsidy. TPCO states that the Department does not grant an adjustment in the AD calculation in ME cases for domestic subsidies because the Department presumes that the benefit from domestic subsidies is fully reflected in both home-market and export-market sales. In other words, according to TPCO, although the Act makes an explicit offset for export subsidies that do not lower domestic prices, the Act also makes an implicit offset for domestic subsidies by allowing the use of lower domestic prices in the AD calculation, prices that are lower precisely because of the pass through of the domestic subsidy. TPCO argues that the important point is that such assumptions about “pass through” are built-into the law.
- TPCO asserts that the Department's conclusion that a double remedy would not occur in virtually all cases in which both CVD duties and NME AD duties are applied is contrary to findings made by other experts that have studied this issue and was explicitly rejected by the United States Government Accounting Office (“GAO”) following its extensive analysis of the issue.
- TPCO claims that the Department's conclusion that there is no evidence of double counting in this case imposes an impermissible burden of proof. TPCO argues that respondents have no burden of proof to establish a double remedy any more than Petitioners have a burden to establish the absence of a double remedy, but that the Department has a duty to investigate the issue, and to identify and request pertinent evidence it needs to resolve the question. Further, TPCO claims, in concluding that there is no double remedy problem, the Department in effect has created what purports to be a rebuttable presumption that a double remedy does not exist, and in so doing, the Department failed to notify respondents of the presumption, failed to notify them of the evidence they would be required to submit to rebut the presumption, and failed to provide an adequate opportunity for them to present rebutting evidence or otherwise to protect their interests. According to TPCO, if the Department is to create a presumption, it must have a rational basis, and must be consistent with economic theory and the Act's structure as a whole. TPCO maintains that while an administrative agency has the power to create a presumption, the presumption “must rest on a sound factual connection between the proved and inferred facts.”
- TPCO submits that this rebuttable presumption is adverse to respondents, and was applied without any attempt by the Department to gather the “evidence” necessary to make an actual finding as to whether or not there is double counting and, thus, it violates the statutory requirement that the Department cannot make adverse inferences unless respondents fail to cooperate.
- TPCO maintains that the Department's refusal to take action to avoid the double counting resulting from the simultaneous application of CVD duties and AD duties utilizing the

NME methodology is unlawful based on the recent decision by the CIT in GPX. TPCO argues that the court specifically ruled that “Commerce cannot avoid addressing an important aspect of the problem caused by applying CVD and AD methodologies to goods from NME countries by placing the burden to demonstrate double counting on respondents, because there is likely no way for any respondent to accurately prove what very well may be occurring.”

- Petitioners argue that TPCO’s assertion that CVD and the NME AD methodology are designed to address the same subsidization is incorrect. Instead, Petitioners state that the NME AD methodology corrects for either high or low price distortions while the CVD methodology corrects for subsidies. Petitioners contend that it is important for the laws to be applied separately.
- Citing Kitchen Shelving Racks, Petitioners argue that TPCO’s assertion that Congress expressed an intention that AD duties be reduced to avoid a double remedy when AD and CVD laws are simultaneously applied to NME imports is incorrect. Rather, Petitioners contend that the Department has recognized that there is nothing in the law that authorizes the Department to make such an adjustment.
- Petitioners state that the only connection between AD and CVD methodologies is Section 772(c)(1)(C) of the Act, which it notes provides that the EP in an AD proceeding should be reduced by the amount of any CVD to offset the export subsidy. Petitioners argue that TPCO relies on this statutory provision as evidence that Congress intended for a similar adjustment to be made for domestic subsidies. Petitioners argue that contrary to TPCO’s assertion, Congress’ explicit inclusion of a statutory provision for the reduction of AD duties when export subsidies are at issue actually implies that no such reduction is appropriate when domestic subsidies are at issue.
- Petitioners argue that, contrary to TPCO’s argument, the Department has not imposed an “impermissible burden of proof” on respondents by requiring them to prove that a double remedy exists. Rather, Petitioners contend that, as the Department explained in Kitchen Shelving Racks, the Department is able to ask respondents in proceedings such as this, with both AD and CVD components, to substantiate their double remedy theory.
- Moreover, Petitioners argue that it is appropriate for the burden to be upon the respondents to substantiate the existence of a double remedy because the respondents are the parties asking the Department to make an adjustment to EP. Given that the respondents are the parties in possession of the data relevant to such an adjustment, Petitioners contend that section 351.401(b)(1) of the Department’s regulations indicates they have the burden of proving the amount and nature of the adjustment.
- Petitioners state that both TPCO and the Hengyang rely on GPX to support their arguments that the Department must avoid and/or correct a double remedy. However, Petitioners argue that reliance on GPX is misplaced because GPX is not a final decision.

- Petitioners also argue that reliance on GPX is also misplaced because GPX did not abide by the required standard of review. Specifically, Petitioners argue that when the interpretation of a statute by an agency is consistent with Congressional intent the court must give the agency's interpretation controlling weight. Petitioners contend that the GPX court was incorrect in finding that the Congressional intent with respect to the issue of double remedy is unclear. Petitioners argue that given the clear statutory language of section 772(c)(i)(c) of the Act, it is clear that Congress intended to exclude an offset for domestic subsidies. Petitioners argue that given this clear congressional intent, the GPX court should have sustained the Department's interpretation of the law on that basis alone.
- Petitioners further argue that reliance on GPX was misplaced because it is based on an understanding that is inconsistent with the Department's current position as expressed in Kitchen Shelving Racks. Specifically, Petitioners argue that the GPX court makes the presumption that domestic subsidies have no effect on NV used to calculate dumping margins under the Department's NME methodology. Petitioners state that in Kitchen Shelving Racks, the Department found this presumption to be invalid because while NME subsidies may not affect the factor values used to calculate NME NV, such subsidies may affect the quantity of factors used to manufacture subject merchandise. Moreover, Petitioners argue that the affect of CVD subsidies on the calculation of NME AD NV was not made clear in the final determinations that were at issue in GPX. Therefore, Petitioners assert that GPX does not apply to the Department's current analysis.
- Petitioners state that TPCO has not demonstrated that the simultaneous application of CVD and NME AD methodologies results in a double remedy. Petitioners note that TPCO uses the example of the CVD applied to its steel billets as proof that a double remedy occurred. However, Petitioners contend that TPCO's argument assumed that the subsidy in question does not affect the NV calculated under the Department's NME methodology. Petitioners assert that there is no basis for this assumption because the subsidy for the steel billets may enable the producer to, for example, purchase more efficient equipment and lower its material, labor and energy cost.
- Petitioners also argue that TPCO's argument regarding double remedy ignores the fact that many subsidies do not take the form of subsidized inputs, but can be treated as grants. Petitioners assert that the Department's NME methodology does not reflect the effects of these items. Therefore there is no argument that the application of CVD laws to such subsidies involves a double remedy.
- The GOC argues that the Department should reject Petitioners' SV arguments because they are advanced in the absence of any consideration by Petitioners of methodologies to resolve the probable double remedy that arises from the simultaneous application of AD and CVD duties calculated on the basis of NME AD methodology.

- The GOC contends that the CIT recognized the overlap between NME AD methodology and CVD in GPX. The GOC asserts that in GPX, the CIT found it unreasonable for the Department to apply AD and CVD remedies simultaneously in a NME proceeding and ordered the Department to adopt new methodologies to make a double remedy unlikely.
- The GOC argues that Petitioners' SV arguments are therefore meaningless.

### **Department's Position:**

The Department disagrees with Hengyang, TPCO, and the GOC that the concurrent application of AD duties calculated under the Department's NME methodology and CVDs creates a double remedy for domestic subsidies in China. As such, we find that the Department is not required to revisit its calculations with respect to this issue or reject Petitioners' SV arguments.

The Department notes that the Act is silent with respect to this issue. The automatic offset in section 772(c)(1)(C) of the Act provides for an adjustment to the AD calculation to offset CVDs based on export subsidies. This, combined with the absence of any such adjustment to offset domestic subsidies, would imply that Congress did not intend for any adjustment to be made to offset domestic subsidies. The AD and CVD laws are separate regimes that provide separate remedies for distinct unfair trade practices. The CVD law provides for the imposition of duties to offset foreign government subsidies. Such subsidies may be countervailable regardless of whether they have any effect on the price of either the merchandise sold in the home market or the merchandise exported to the United States. AD duties are imposed to offset the extent to which foreign merchandise is sold in the United States at prices below its fair value. With one exception, AD duties are calculated the same way regardless of whether there is a parallel CVD proceeding.

The one point of contact between the AD and CVD regimes is section 772(c)(1)(C) of the Act. This provision requires that the price used to establish the EP shall be increased by "the amount of any CVD imposed on the subject merchandise . . . to offset an export subsidy." TPCO suggests that the Department erred in refusing to interpret this provision as if it actually read, "to offset an export subsidy or, where the NME antidumping methodology is applied, a domestic subsidy." In other words, TPCO would have the Department read an automatic 100-percent offset for domestic subsidies in NME AD proceedings into the Act, based upon the logic purportedly inherent in Congress's decision to provide an automatic offset for export subsidies to implement the requirements of Article VI(5) of the GATT. Plainly, the highlighted language is not in the Act, which does not provide the automatic offset sought by TPCO. Moreover, contrary to the respondent's assertion, the GAO study cited by TPCO does not create any legitimate doubts about the Department's interpretation of the Act. The GAO did not conclude that domestic subsidies were automatically passed through into EPs, pro rata. On the contrary, in referring to the possibility of double counting that might result from the simultaneous application of CVDs and the Department's NME AD methodology, the GAO Report stated that "current trade law does not make any specific provision for adjusting antidumping duties in such

situations, and the implications of such situations arising are therefore unclear.”<sup>8</sup> Similarly, in Cold-Rolled Steel from Korea, cited by TPCO, the Department refers only to adjusting the AD duties for any CVD determined to be based on export subsidies,<sup>9</sup> and does not find an automatic pro rata offset for domestic subsidies. As the Department noted in Low Enriched Uranium from France, Congress amended the Act to provide for an adjustment to the AD calculation to offset CVDs for export subsidies. If anything, the absence of the additional language related to a domestic subsidy implies that Congress intended to not provide the additional adjustment for domestic subsidies.

In fact, the legislative history of the export subsidy adjustment establishes only that Congress considered it to satisfy the obligations of the United States under Article VI:5 of the GATT. The legislative history does not appear to be based on any specific assumption about whether foreign government subsidies lower prices in the United States and, in fact, is not solely concerned with the effects of subsidies in the United States.<sup>10</sup> Thus, although the Act requires a full adjustment of AD duties for CVDs based on export subsidies in all AD proceedings, it provides no basis for concluding that Congress’ action was based on any specific assumptions about the effect of subsidies upon EPs. It may be simply that Congress recognized the complexity of the issues that would have had to have been resolved in order to provide anything less than a complete offset for export subsidies, and simply opted for a full offset to avoid those potential problems.

Whether Congress considered the economic assumptions that might have been behind the failure of the GATT contracting parties to address domestic subsidies in Article VI:5 is not clear. In any event, all that the contracting parties may have assumed was that domestic subsidies had a symmetrical effect upon export and domestic prices. This presumed symmetrical impact may have been a pro rata or de minimis reduction in these prices. Thus, it is not correct to conclude that Congress assumed that the GATT contracting parties assumed that domestic subsidies lower EPs, pro rata, still less that Congress built any assumptions about the price effects of domestic subsidies into the antidumping law.

Indeed, TPCO cites no statutory provision that would be a basis for imposing such an adjustment because there are no such provisions in the Act. The various theories advanced by respondents in prior cases to support their requests for an automatic 100-percent offset of AD duties determined under the NME methodology by any CVD duties are based on mistaken premises. Accordingly, the Department has consistently and properly rejected these claims.<sup>11</sup> Similarly, in the instant investigation, TPCO asserts that export subsidies automatically lower EPs, pro rata, thereby increasing dumping margins and, as a result, the Act makes an explicit offset for export subsidies. However, where the Department disagrees with TPCO is with their claim that the Act also makes an implicit offset for domestic subsidies by allowing the use of lower domestic prices in the AD calculation in ME cases, prices that are lower precisely because of the “pass through”

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<sup>8</sup> See GAO Report (June 2005) at 28.

<sup>9</sup> See Cold-Rolled Steel from Korea, 67 FR at 62125 (October 3, 2002).

<sup>10</sup> See Trade Agreements Act of 1979, Report of the Committee on Finance United States Senate on H.R. 4537, July 17, 1979, 96th Cong., 1st Sess. Rep. No. 96-249; Trade Agreements Act of 1979, Statement of Administrative Action, H. Doc. No. 96-153, Part II (1979), at 412.

<sup>11</sup> See Kitchen Shelving at Comment 1 (July 27, 2009).

of the domestic subsidy, according to TPCO. TPCO argues that the important point is that such assumptions about “pass through” are built into the law. The Department has rejected this proposition.<sup>12</sup>

TPCO is similarly mistaken about the Department's statement in Low Enriched Uranium from France, that “domestic subsidies presumably lower the price of the subject merchandise in the home and the U.S. markets.”<sup>13</sup> This statement does not stand for the proposition that domestic subsidies are passed through into EPs, pro rata. Taken at face value, the statement is that “domestic subsidies presumably lower the price of the subject merchandise in export markets . . . .” This is no more than a presumption, and a very limited presumption at that - e.g., the reductions in price could be 1 percent of the subsidy in each market. The Department's point was not that all domestic subsidies are presumed to be fully passed through into domestic and EPs, but that the effect of domestic subsidies on the price in each market presumably was the same.

The Department has explained that the effect of domestic subsidies upon EPs depends upon many factors (e.g., the supply and demand for the product on the world market, and the exporting countries' share of the world market), and is therefore speculative.<sup>14</sup> Thus, the Department has correctly refused to assume that domestic subsidies automatically reduce EPs, pro rata. There is substantial support for the Department's position in the economic literature.<sup>15</sup>

In considering the impact of domestic subsidies upon EPs, the form of the subsidy is again important because, like export subsidies, some domestic subsidies give domestic producers a greater incentive to increase production than others. A production subsidy (e.g., the provision of raw materials at reduced prices) reduces the unit cost of producing that merchandise and, therefore, increases the producer's profit on sales of that merchandise. This may give the producer a commercial incentive to increase production of that merchandise. In a NME, however, it is not necessarily safe to assume that economic decisions are made on the basis of such market forces. In any event, more general subsidies (e.g., general grants or debt forgiveness) would not provide that direct incentive. A foreign producer might use a general subsidy to modernize its plant, pay higher dividends, fund research and development, clean up the environment, make severance payments, increase the production of some other product, or waste the money. Consequently, this type of domestic subsidy will not necessarily result in any increase in production and, therefore, will not necessarily result in any reduction in EPs, still less an automatic pro rata reduction.

Even if a producer attempted to respond to a domestic subsidy exclusively by increasing production, it might not be able to do so, at least in the short or medium term. Various constraints (e.g., limits on the supply of raw materials, energy, or transportation) might limit its

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<sup>12</sup> Id.

<sup>13</sup> See Low Enriched Uranium from France, 69 FR 46501 (August 3, 2004),

<sup>14</sup> See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China, 73 FR 9278 (February 20, 2008).

<sup>15</sup> See World Trade Organization, World Trade Report 2006, p. 57; Alex F. McCall and Timothy E. Jostling, Agricultural Policies and World Markets, MacMillan Pub. Co., 1985, p. 126-7.

ability to do so. Moreover, adding capacity takes time. Thus, it would be incorrect to claim that domestic subsidies automatically result in increased production.

Additionally, even if all producers in an NME country do respond to domestic subsidies by increasing production, it is by no means certain that this increase would result in lower EPs. If the world market price is going up, it is not realistic to assume that an NME producer that receives a domestic subsidy automatically will reduce its EPs by the full amount of the subsidy, as allocated under the Department's CVD methodology. Increased production and exports will tend to lower EPs over time, but this reduction will be neither automatic nor necessarily pro rata. In fact, during the years preceding prior Department investigations, some PRC producers raised their prices in line with world market prices, despite having received substantial subsidies.<sup>16</sup> Increased export sales will reduce the price of the subject merchandise on world markets only to the extent that the producer or producers in question supply a substantial share of the world market, so that the additional production will drive down prices in that market. Even this will take time and will not occur if other producers in the market reduce production to avoid a price war. In sum, as the Department concluded in OTR Tires from China,<sup>17</sup> the relationship of domestic subsidies to EPs is speculative.

TPCO's presumption about the effect of domestic subsidies on EPs is derived from what they consider to be the assumption that Congress made concerning export subsidies in amending section 772 of the Act to require the automatic addition to U.S. prices of CVDs to offset export subsidies - that export subsidies automatically reduce EPs, pro rata. The implication is that Congress did not provide an adjustment for domestic subsidies because Congress considered them to reduce both EPs and domestic prices, pro rata, thereby not affecting the dumping margin. However, TPCO argues that under the NME methodology, the Department compares the EP, presumably reduced by the domestic subsidies, to a NV that has been calculated using non-subsidized SVs, meaning that the respondents argue that safeguards against double counting that they claim are inherent in the ME methodology don't exist in the Department's NME methodology.

This argument that domestic subsidies inflate dumping margins by automatically lowering EPs assumes that domestic subsidies in NME countries do not affect NV. There is no basis for this assumption. Put simply, while NME subsidies may not affect the factor values used to calculate NV in an NME proceeding, such subsidies may easily affect the quantity of factors consumed by the NME producer in manufacturing the subject merchandise.

The simplest example would be where a domestic subsidy in an NME country enables an investigated producer to purchase more efficient equipment, lowering its consumption of labor, raw materials, or energy. When the SVs are multiplied by the NME producer's lower factor

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<sup>16</sup> See Certain New Pneumatic Off-the-Road Tires from China, ITC Final Report (Publ. 4031, August 2008), pages IV-5 (Table IV-2), E-3 (Table E-1) and E-6 (Table E-4); Circular Welded Carbon-Quality Steel Pipe from China, ITC Preliminary Report, (Publ. 3938, July 2007), pages V-12 ((Table V-3) V-14 (Table V-5), and V-19, showing rising average unit values on imports from China for the years 2005-2007.

<sup>17</sup> See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008) ("OTR Tires from China").



quantities, they result in lower NVs and, hence, lower dumping margins.<sup>18</sup> Any reduction in factor usage by NME producers would reduce NV in a second manner, because the final factor values are also used to calculate the amounts for overhead, SG&A, and profit that are additional components of NV.

Moreover, in determining NV in NME cases, the Department does not exclusively use factor quantities in the NMEs valued in the surrogate, ME country. Some factors values are based on the prices of imported inputs (priced in the currency of the country from which the inputs were obtained or in U.S. dollars). Given that the input suppliers in these countries are often competing with PRC suppliers of those same inputs, it is by no means safe to assume that those prices are not influenced by subsidies in China.

Finally, in at least some cases, the NME exports of the subject merchandise will account for a significant share of the world market, enough to influence prices in world markets. In such cases, particularly where the industry is export oriented or has excess capacity (a chronic problem in China), subsidies could increase output and exports from China, which, in turn, would reduce the prices of the good in question in world markets. These lower prices would reduce profits for producers selling in these markets which, in turn, would reduce the profit the Department derives from their financial statements, (used as surrogates for the PRC producers), and, thus, reduce NV.

Another argument put forth by the GOC and respondents, *i.e.*, that AD and CVD proceedings against NME countries automatically result in the application of a double remedy is even vaguer. Specifically, TPCO argues that the effects of countervailable domestic subsidies can pass through to NV under the Department's NME methodology, so that AD duties on PRC exports, by themselves, remedy all subsidies attributable to that merchandise. In other words, TPCO asserts that the NME methodology inherently provides a remedy for any and all countervailable subsidies such that concurrent application of CVDs is necessarily duplicative. Apparently, the respondents conclude that the NME methodology arrives at this result mechanically because of the lack of any statutory provision that requires or achieves this result.

It appears that the general premise of this argument is that concurrent ADs and CVDs do not create automatic double remedies in ME proceedings, because domestic subsidies automatically lower NV, and hence the dumping margins, *pro rata*. The NME AD methodology, on the other hand, produces a NV that is not affected by subsidies in any way, so that it necessarily exceeds what would have been the ME dumping margin by the full amount of the subsidy, thus creating a double remedy, which the statute requires the Department to offset. We reject this proposition.

There are several reasons why subsidies in ME cases would not necessarily lower the NV calculated by the Department, *pro rata*, below what it would have been absent any subsidies. Subsidies often come with conditions attached that reduce the cost savings to the recipient below the nominal amount of the benefit received. For example, subsidy recipients may be required to retain redundant workers, maintain higher levels of production than would be optimum, remain in economically disadvantageous locations, reduce pollution, obtain supplies from favored

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<sup>18</sup> See section 773(c)(3) of the Act.

sources, and so forth. Even if subsidies come with no strings attached, there is no guarantee that they will result in a lower cost of production. Subsidies could be paid out as dividends, used to increase executive pay, or wasted in any number of ways.

Moreover, the Act provides that NV in ME cases is to be based on home market prices, where possible. Where NV is based on prices, the relationship of subsidies to NV becomes yet more tenuous. Not only is the extent to which the subsidies will affect costs uncertain but, even to the extent that subsidies may lower costs, the extent to which the producer will pass these cost savings through to home market or third-country prices is uncertain. Basic economic principles indicate that the prices are a function of the supply and demand for the product in the relevant market, so that any cost savings will be reflected in prices only indirectly.

Finally, to the extent that domestic subsidies lower NV in ME cases, they may lower EPs commensurately, so that the dumping margins may not change. Thus, it is not safe to conclude that subsidies in MEs automatically reduce dumping margins, still less that they automatically reduce dumping margins, pro rata.

The counterpoint to the argument that domestic subsidies automatically lower NVs (and, thus, dumping margins) in ME cases, pro rata, is that domestic subsidies have no effect whatsoever on NVs (and, thus, dumping margins) determined under the NME methodology. Respondents argue that domestic subsidies do not affect NV in NME cases because NV is essentially imported from surrogate, ME, countries. As explained above, this premise is also incorrect, as there are several ways in which subsidies can lower NME NVs.

Moreover, the whole idea of comparing AD margins under the NME methodology to the theoretical margins that the Department would find if it treated China as an ME country is dependent upon other things being equal, so that any actual difference could be attributed to the difference in the distortion from subsidies. But this is not the case. The most obvious difference between NVs determined in ME and NME situations involves exchange rates. In ME proceedings, NVs are converted from the home-market currency to the currency of the importing country at prevailing exchange rates. In NME proceedings, however, NVs are derived from the actual FOP that are valued based on information from the surrogate country using the currency of that surrogate country. Thus, NVs in NME proceedings are not influenced by the exchange rate between the exporting country and the importing country. How the different roles that currencies play in NME and ME antidumping proceedings affect any difference in dumping margins calculated under the two methodologies is uncertain, and highly complex. What is certain, however, is that this key difference would prevent any simple comparison of NME and ME AD margins.

TPCO asserts that the fact that the Department may find that an input for a particular product was provided for less than adequate remuneration in a CVD case, and then used a SV for that input in the AD case, proves that the subsidy lowered NV, pro rata. This conclusion is not logical. NME methodology involves more than the simple addition of input costs. It is a complex calculation that takes into consideration operating efficiencies, administrative expenses, the cost of capital, and numerous other factors. A SV for one FOP that is higher than the price

actually paid by the respondent company does not necessarily result in a higher dumping margin, nor does a lower SV for one FOP necessarily result in a lower dumping margin. The individual elements of the NME methodology do not exist in a vacuum; the various elements necessarily work together. Moreover, TPCO did not provide evidence demonstrating how the CVD the Department found on steel billets in the companion CVD case lowered NV in this AD case.

In Kitchen Racks<sup>19</sup> and OTR Tires from China,<sup>20</sup> the Department refused to interpret the Act requiring the automatic addition of export subsidies to U.S. prices in NME proceedings as an automatic addition of domestic subsidy CVDs. The Department refused to deduct domestic CVDs from U.S. prices because this would have resulted in the collection of total AD duties and CVDs that would have exceeded both independent remedies in full. The Federal Circuit has upheld this position.<sup>21</sup> Similarly, the Department's refusal to treat antidumping duties and safeguard duties as a cost in AD calculations reflects the Department's effort to collect these distinct remedies in full, but no more.

The Department is charged with calculating dumping margins as accurately as possible. TPCO fails to identify any item in the dumping margin calculation that is being counted twice. Thus, even if the NV and EP have been determined accurately, TPCO contends that the difference between these amounts should not be treated as the margin of dumping. Rather, because TPCO argues that the CVD law cannot be applied concurrently with the NME AD methodology, they would argue that the margin of dumping would be determined as the difference between the NV and EPs (or constructed export price ("CEP")), less the amount of the CVD determined in a concurrent investigation of subsidies. Contrary to TPCO's assertions, nothing is being double counted in the dumping margin calculation. Accordingly, the accurately calculated dumping margin should be collected in full as the remedy for pricing at less than NV.

Additionally, we do not agree with TPCO's argument that the Department's conclusion in several prior cases that there is no evidence of a double remedy imposes an impermissible burden of proof. This would imply that TPCO attempted to furnish some evidence that a double remedy was actually created, but was unable to meet the heavy burden of proof imposed upon it by the Department. TPCO asked the Department to read an automatic 100-percent offset into the Act that would make any evidence concerning the alleged double remedy irrelevant. Even in cases where a clear statutory basis for granting a price adjustment exists, the burden to establish entitlement to that adjustment is on the party seeking the adjustment, which has access to the necessary information.<sup>22</sup>

Lastly, we reject the notion that Congress passed the AD and CVD laws to correct unspecified

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<sup>19</sup> See Certain Kitchen Shelving and Racks from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 74 FR 37012 (July 27, 2009).

<sup>20</sup> See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008).

<sup>21</sup> See Wheatland Tube Co. V. United States, 495 F. 3d 1355 (Fed. Cir. 2007) (reversing Wheatland Tube v. United States, 414 F. Supp. 2d at 1271 (CIT 2006)).

<sup>22</sup> See Statement of Administrative Action, H. Doc. No. 103-316, Vol. 1 (1994) at 829.

economic distortions and that, to the extent that these unspecified economic distortions may overlap, the Department is required to measure this overlap and provide an offset. Congress established two separate remedies for what it evidently regards as two separate unfair trade practices. The only point at which the Act requires the Department to reconcile these separate remedies is in the adjustment of AD duties to offset export subsidies. Because neither AD nor CV duties are concerned with economic distortion, as such, but are simply remedial duties calculated according to the detailed specifications of the Act, it follows that no overall economic distortion cap for concurrent proceedings can be distilled from the Act.

The theory advanced by TPCO would not result in a reduction in AD or CVD assessed in concurrent proceedings by some fraction of the CVD. The theory is that the NME AD methodology entirely replaces subsidized, below market, costs with purely market-determined costs, creating a double remedy to that full extent. Thus, accepting this theory would result in the complete nullification of CVDs for China, as long as the NME methodology is applied. The Department does not accept this premise.

Additionally, the respondents' reliance on GPX is misplaced. This decision is not final, as a final order has not been issued by the CIT, nor have all appellate rights been exhausted. Even if reliance on GPX (CIT 2009) were not misplaced, GPX does not support the positions attributed to it by the respondents. GPX did not find a double remedy necessarily occurs through concurrent application of the CVD statute and NME provision of the AD Act, only that the “potential” for such double counting may exist.

### **Comment 3: Zeroing**

- Petitioners argue that the use of zeroing in all segments of an antidumping proceeding, including the investigation, is required by the statute and, therefore, the Department should use zeroing to calculate the respondents' dumping margin in the final determination.
- Petitioners also argue that if zeroing is not used, the provisions of section 777A(d) of the Act are rendered meaningless because the margin result will be exactly the same regardless of the comparison methodology used. Petitioners claim that the U.S. government has recognized<sup>23</sup> that if zeroing is not used, the dumping margin will be identical regardless of whether the average-to-average or average-to-transaction comparison methodology is used.
- Petitioners contend that Congress' intention for the Department to use zeroing is made clear by the changes it made to the statute in 1994 to mandate particular comparison methodologies to be used.
- Petitioners maintain that the U.S. Supreme Court and the United States Court of Appeals for the Federal Circuit (“CAFC”) have repeatedly held that a statute be interpreted so as

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<sup>23</sup> Petitioners cite to Opening Statement of the United States at the First Substantive Meeting of the Panel, United States - Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/R (March 16, 2005).

to avoid rendering superfluous any provisions of the statute and therefore, the statute requires the use of zeroing in order to give effect to the different comparison methodologies.

- The GOC and TPCO argue that Petitioners' arguments regarding zeroing have been repeatedly struck down by the World Trade Organization ("WTO") Panels and Appellate Body which concluded that the Department's use of zeroing in the investigation phase violates the WTO Anti-Dumping Agreement because of its failure to consider the results of all comparisons.
- The GOC argues that the holdings by the WTO Appellate Body apply with equal force to the average-to-transaction methodology in addition to the average-to-average methodology.
- The GOC and TPCO argue that the Department acknowledged the WTO Panel's finding in United States-Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing").
- The GOC and TPCO argue that the language of the Department's Final Modification<sup>24</sup> makes explicit that the Department will not engage in zeroing during an investigation of an antidumping proceeding.
- TPCO argues that in Final Modification, the Department concluded that, contrary to Petitioners' arguments, the statute does not require the denial of offsets and the use of the offset is a reasonable interpretation of the statute.
- The GOC and TPCO further argue that the CIT and CAFC have rejected Petitioners' contention that the statute is unambiguous on its face in requiring zeroing.
- The GOC and TPCO maintain that the CIT held that the Department's revised practice in regards to zeroing is a reasonable interpretation of the statute.

#### **Department's Position:**

The Department does not agree with Petitioners' assertion that the statute precludes the Department from following the methodology for calculating the weighted-average dumping margin as set forth in the Final Modification. In Corus Staal 2005, the CAFC found that ambiguity in the statute was present such that the Department was permitted, but not required, to use its "zeroing" methodology for calculating weighted-average dumping margins in investigations.<sup>25</sup> With respect to Petitioners' argument that providing offsets for non-dumped sales would result in the same margin regardless of which comparison methodology is employed, thereby rendering the statute meaningless, the Department disagrees with Petitioners' claim that

<sup>24</sup> The GOC and TPCO cite the notice Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006).

<sup>25</sup> See Corus Staal 2005 at 1347.

the Department is making such an interpretation. Pursuant to the Final Modification, it is now the Department's standard practice to grant offsets for non-dumped comparisons (i.e., not to apply the “zeroing” methodology) where it uses the average-to-average comparison methodology in investigations.<sup>26</sup> Contrary to Petitioners’ claim, this standard practice produces meaningfully different results from application of the average-to-transaction methodology where the criteria of section 777A(d)(1)(B) of the Act are satisfied because in such cases offsets are not routinely granted. It has not been the Department's practice to provide offsets for non-dumped comparisons when using the average-to-transaction comparison methodology. It should be noted, however, that we disagree with Petitioners’ argument that the U.S. government has taken a position that the WTO Anti-Dumping Agreement dictates either an application of the average-to-average or an average-to-transaction comparison methodology for all sales. The U.S. government's position in that dispute was that, if offsets are required, mathematical equivalence was obtained regardless of whether the average-to-average methodology or the average-to-transaction methodology was applied to all sales.

With respect to Petitioners’ argument that the Department is not acting in accordance with Congress' intent, we note that as part of the implementation process that led to the Final Modification, the Department consulted with Congress regarding the scope of that implementation.<sup>27</sup> This consultation combined with Congress' express acknowledgement that addressing adverse WTO reports could lead to differing interpretations of the same statute,<sup>28</sup> demonstrates that Commerce has not violated Congressional intent. The Department, therefore, has not changed its calculation of the weighted-average dumping margin as suggested by Petitioners for this final determination, and to the extent that the average-to-average comparison methodology is used, the Department continues to apply offsets for non-dumped comparisons in accordance with the policy set forth in the Final Modification.

#### **Comment 4: Whether to Deduct PRC VAT from U.S. Price**

- Petitioners contend that the Department should deduct VAT from Hengyang’s and TPCO’s U.S. prices because the PRC government imposed a 17 percent VAT on both respondents export sales and the U.S. prices should be reduced by the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States.<sup>29</sup>
- Petitioners note that the Department’s current policy is not to deduct VAT from U.S. price in NME cases because the Department’s practice, as detailed in Silicon Metal from

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<sup>26</sup> See Final Modification.

<sup>27</sup> See 19 USC § 3533(g).

<sup>28</sup> In enacting the Uruguay Round Agreements Act, Congress contemplated that such implementation of an adverse WTO report could create different, but permissible, interpretations of the statute that may lawfully coexist. See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, Vol. 1, at 1027.

<sup>29</sup> See section 772(c)(2)(B) of the Act.

China,<sup>30</sup> is not to take into account transfers between NME entities. However, Petitioners contend that because the VAT is paid by the final customer, which is a market entity, the transaction does not represent an internal NME transfer and, therefore, the VAT should be deducted from U.S. price. In addition, Petitioners argue that because the Department prefers to calculate NV using SVs which are tax-exclusive, in order to make an apples-to-apples comparison between NV and the U.S. price, the Department should not use a tax-inclusive U.S. price.

- Alternatively, Petitioners argue that should the Department decide not to deduct VAT from respondents' U.S. prices, the Department should add taxes to the SVs that it uses in calculating NV.
- Hengyang and TPCO contend that Petitioners have pointed to no record evidence demonstrating that the 17 percent VAT is included in the price charged by Hengyang and TPCO for subject merchandise, and therefore, similar to OCTG from China,<sup>31</sup> there is no basis for the Department to make any deduction.

### **Department's Position:**

Pursuant to the CAFC's decision in Magnesium Corp. of Am. v. United States, 166 F.3d 1364, 1370 (Fed. Cir. 1999) and the Department's NME practice, the Department has determined not to reduce Hengyang's and TPCO's U.S. sales prices based upon a VAT imposed by the PRC government. Petitioners' contention for deduction of the VAT is based on the assumption that the PRC government's VAT imposition was necessarily included in the U.S. price and that the Department should deduct it from the respondents' U.S. prices as an export tax. However, the tax payments by NME respondents to NME governments are intra-NME transfers that the Department does not consider under its NME methodology. In Certain Cut-to-Length Carbon Steel Plate From Romania: Final Results of Antidumping Duty Administrative Review, 65 FR 1847 (January 12, 2000), the Department declined to reduce U.S. price based upon a tax imposed by an NME government on foreign inland freight because the tax was an intra-NME transfer that the Department could not consider under its NME methodology. The same principle applies here as the PRC VAT is an internal NME transaction that does not provide a basis to reduce U.S. price pursuant to section 772(c)(2)(B) of the Act. As the Department explained in Silicon Metal from China, the Department has found that it cannot, in the NME context, "apply the statutory instruction set forth in section 772(c)(2)(B) to reduce U.S. price by the amount of any export tax, duty, or other charge imposed by the export country on exports of subject merchandise," because prices and costs within an NME country are not considered reliable measures of value. Accordingly, because the Department does not rely on NME prices and cannot determine how

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<sup>30</sup> See Silicon Metal from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 75 FR 1592, (January 12, 2010) ("Silicon Metal from China") and accompanying Issues and Decision Memorandum at Comment 1.

<sup>31</sup> See Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping, 75 FR 20335 (April 19, 2010) ("OCTG from China") and accompanying Issues and Decision Memorandum at Comment 5.

much of the VAT imposed on Hengyang's and TPCO's sales is reflected in the U.S. prices, the Department has no basis to reduce U.S. prices for the VAT.<sup>32</sup> We find Petitioners' reliance of Wire Rod from Mexico<sup>33</sup> unpersuasive because, in that case, the Department was considering a ME country in which it was relying on the respondent's prices and costs.

Also, because the Department cannot determine how much of the VAT imposed on Hengyang's and TPCO's sales are reflected in the U.S. prices, we cannot add taxes to Hengyang's and TPCO's NV. Contrary to Petitioners' argument, we have no record evidence in the sales documentation for Hengyang and TPCO indicating that VAT is included in the U.S. sales prices.

Therefore, for the final determination, the Department has determined not to reduce respondents U.S. prices by the VAT or to add taxes to the SVs used in calculating NV.

## II. Surrogate Values

### Comment 5: The Appropriate Surrogate Value for Labor

- Hengyang argues that the Department should abandon the methodology used in the Preliminary Determination and instead comply with the requirements of 19 CFR 1677b(c)(4).
- TPCO argues that the Department's regression methodology is contrary to the law because it includes wage data from countries whose economies are not comparable to that of the PRC or are not significant producers of comparable merchandise. TPCO further argues that the CAFC has found this methodology unlawful. Therefore, the Department must use an alternative methodology to value TPCO's labor.
- TPCO argues that the Department should use Indian income data from the Department's regression model of \$0.47 per hour to value its labor.
- Petitioners argue that the Department should use the new methodology that it developed as a result of the decision in Dorbest Ltd. v. United States, 604 F.3d 1363, 1371 (CIT 2010) ("Dorbest II"), which would result in a SV of \$1.21 per hour for labor.
- Petitioners argue that the Department should reject TPCO's argument to use India's wage data from the Department's regression model because the Department has already rejected this argument and TPCO does not provide any reason why using only India is better than the Department's new methodology using wage data from multiple countries that are economically comparable to the PRC and significant producers of comparable merchandise.

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<sup>32</sup> See also Titanium Sponge From the Russian Federation: Notice of Final Results of Antidumping Duty Administrative Review, 61 FR 58525, 58529 (November 15, 1996).

<sup>33</sup> See Carbon and Certain Alloy Steel Wire Rod from Mexico: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 13532 (March 13, 2008) ("Wire Rod from Mexico") and accompanying Issues and Decision Memorandum at Comment 2.



- Petitioners support the Department’s decision on the Honduran wage rate in Warmwater Shrimp from Vietnam<sup>34</sup> and asks that the Department reject the Honduran wage rate in the instant investigation for the same reasons.

### **Department’s Position:**

As a consequence of the CAFC’s ruling in Dorbest II, the Department is no longer relying on the regression-based wage rate described in 19 CFR 351.408(c)(3). The Department is continuing to evaluate options for determining labor values in light of the recent CAFC decision. For this final determination, the Department has calculated an hourly wage rate to use in valuing TPCO’s and Hengyang’s reported labor input by averaging earnings and/or wages in countries that are economically comparable to the PRC and that are significant producers of comparable merchandise.

TPCO argues that the Department should use the hourly wage rate for India from the ILO as an alternative to our previous regression-based wage rate.<sup>35</sup> The Department disagrees. While information from a single surrogate country can reliably be used to value other FOP, wage data from a single surrogate country does not constitute the best available information for purposes of valuing the labor input due to the variability that exists between wages and GNI. While there is a strong worldwide relationship between wage rates and GNI, too much variation exists among the wage rates of comparable MEs. As a result, we find reliance on wage data from a single country to be unreliable and arbitrary. For example, when examining the most recent wage data, even for countries that are relatively comparable in terms of GNI for purposes of factor valuation (e.g., countries with GNIs between USD 950 and USD 4,100), the wage rate spans from USD 0.47 to USD 2.08.<sup>36</sup> Additionally, although both India and Guatemala have GNIs below USD 2500, and both could be considered economically comparable to the PRC, India’s observed wage rate is USD 0.47, as compared to Guatemala’s observed wage rate of USD 1.14 – over double that of India.<sup>37</sup> There are many socio-economic, political and institutional factors, such as labor laws and policies unrelated to the size or strength of an economy, that cause significant variances in wage levels between countries. For this reason, and because labor is not traded internationally, the cross-country variability in labor rates, as a general rule, does not characterize other production inputs or impact other factor prices. Accordingly, the large variance in these wage rates illustrates the arbitrariness of relying on a wage rate from a single country. For these reasons, the Department maintains its longstanding position that, even when not employing a regression methodology, more data are still better than less data for purposes of valuing labor. Accordingly, the Department’s has employed a methodology that relies on a larger number of countries in order to minimize the effects of the variability that exists between wage data of comparable countries.

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<sup>34</sup> See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 75 FR 47771 (August 9, 2010) and accompanying Issues and Decision Memorandum at Comment 9.

<sup>35</sup> See TPCO’s case brief at 45.

<sup>36</sup> See “Expected Wages of Selected NME Countries,” revised in December 2009, available at <<http://ia.ita.doc.gov/wages/index.html>>.

<sup>37</sup> See “Expected Wages of Selected NME Countries,” revised in December 2009, available at <<http://ia.ita.doc.gov/wages/index.html>>.

To achieve a labor value that is based on the best available information for this final determination, the Department has relied on labor data from several countries determined to be both economically comparable to the PRC, and significant producers of comparable merchandise.

First, in order to determine the economically comparable surrogate countries from which to calculate a surrogate wage rate, the Department looked to the Preliminary Determination.<sup>38</sup> Early in this investigation, the Department selected six countries for consideration as the surrogate country for this investigation. To determine which countries were at comparable levels of economic development to the PRC, the Department placed primary emphasis on GNI.<sup>39</sup> The Department relies on GNI to generate its initial list of countries considered to be economically comparable to the PRC. In this investigation, the list of potential surrogate countries found to be economically comparable to the PRC included India, the Philippines, Indonesia, Thailand, Ukraine and Peru. The Department used the high- and low-income countries identified in the Surrogate Country Memorandum list as “bookends” and then identified all countries in the World Bank’s World Development Report for 2008 with per capita incomes (using the 2008 GNIs from the 2009 Expected Wages of Selected NME Countries) that placed them between these “bookends.” This resulted in 43 countries, ranging from India with USD 1,040 GNI to Peru with USD 3,990.<sup>40</sup>

Regarding the second criterion of “significant producer,” the Department identified all countries which have exports of comparable merchandise (defined as HTS 730419, 730431, 730439, 730451, 730459, which are identified in the scope of this investigation between 2007 and 2009).<sup>41</sup> After screening for countries that had exports of comparable merchandise, we found that 25 of the 43 countries designated as economically comparable to the PRC are also significant producers. In this case, we have defined a “significant producer” as a country that has exported comparable merchandise from 2007 through 2009. The antidumping statute and regulations are silent in defining a “significant producer,” and the antidumping statute grants the Department discretion to look at various data sources for determining the best available information. See section 733(c) of the Act. Moreover, while the legislative history provides that the “term ‘significant producer’ *includes* any country that is a significant net exporter,”<sup>42</sup> it does not preclude reliance on additional or alternative metrics. In practice, the Department has relied on other indices for determining whether a country is a significant producer. For example, in Wooden Bedroom Furniture from the PRC,<sup>43</sup> the Department relied on production data for selecting the primary surrogate country. In this case, we have relied on countries with exports of comparable merchandise as significant producers.

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<sup>38</sup> See Preliminary Determination, 75 FR 22372, 22376.

<sup>39</sup> See 19 CFR 351.408(b).

<sup>40</sup> See Memorandum to the File through Howard Smith, program manager, regarding “Data on Labor Wage,” dated July 16, 2010 (“Wage Data Memorandum”) for GNI data.

<sup>41</sup> The export data is obtained from the Global Trade Atlas. See Wage Data Memorandum.

<sup>42</sup> See Conference Report to the 1988 Omnibus Trade & Competitiveness Act, H.R. Conf. Rep. No. 576, 590, 100<sup>th</sup> Cong. 2<sup>nd</sup> Sess. (1988), reprinted in 134 Cong. Rec. H2031 (daily ed. April 20, 1988).

<sup>43</sup> See Wooden Bedroom Furniture from the People’s Republic of China: Preliminary Results of Antidumping Duty New Shipper Review, 75 FR 9581, 9584 (March 3, 2010).

For purposes of valuing wages in this investigation, the Department determines the following 25 countries to be both economically comparable to the PRC, and significant producers of comparable merchandise: Albania, Bolivia, Cape Verde, Ecuador, Egypt, El Salvador, Fiji, Guatemala, Guyana, Honduras, India, Indonesia, Jordan, Mongolia, Morocco, Nicaragua, Peru, the Philippines, Sri Lanka, Sudan, Swaziland, Syria, Thailand, Tunisia, and Ukraine.

Third, from the 25 countries that the Department determined were both economically comparable to the PRC and significant producers of comparable merchandise, the Department identified those with the necessary wage data. In doing so, the Department has continued to rely upon ILO Chapter 5B data “earnings”, if available and “wages” if not.<sup>44</sup> We used the most recent data within five years of the base year and adjusted to the POI using the relevant Consumer Price Index.<sup>45</sup> Of the 25 countries that the Department has determined are both economically comparable and significant producers of comparable merchandise, certain countries, *i.e.*, Bolivia, Cape Verde, Honduras, Morocco, Sudan, Swaziland, Syria, and Tunisia, were not used in the wage rate valuation because there was no earnings or wage data available. The remaining countries reported either earnings or wage rate data to the ILO within the last five years.<sup>46</sup>

With regards to the Honduran wage rate provided by the ILO, the Department agrees with Petitioners and is rejecting this wage rate since record evidence demonstrates that this wage rate is inaccurate, possibly due to an ILO reporting error. Record evidence also demonstrates that the effective Honduran minimum wage during the same year as the underlying ILO data (2006) is USD 91.99 per month. With the assumption that the current reported ILO wage rate is USD 0.18 per hour, a worker would earn an average monthly wage of USD 34.56, nearly a third of the

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<sup>44</sup> The Department maintains its current preference for “earnings” over “wages” data under Chapter 5B. However, under the previous practice, the Department was typically able to obtain data from somewhere between 50-60+ countries. Given that the current basket now includes 16 countries, the Department found that our long-standing preference for a robust basket outweighs our exclusive preference for “earnings” data. We note that several countries that met the statutory criteria for economic comparability and significant production, such as Indonesia and Thailand, reported only a “wage” rate. Thus, if earnings data is unavailable from the base year (2007) of the previous five years (2002-2006) for certain countries that are economically comparable and significant producers of comparable merchandise, the Department will use “wage” data, if available, from the base year or previous five years. The hierarchy for data suitability described in the 2006 Antidumping Methodologies: ME Inputs, Expected Non-ME Wages, Duty Drawback; and Request for Comments, 71 FR 61716, (October 19, 2006) (“Antidumping Methodologies”) still applies for selecting among multiple data points within the “earnings” or “wage” data. This allows the Department to maintain consistency as much as possible across the basket.

<sup>45</sup> Under the Department’s regression analysis, the Department limited the years of data it would analyze to a two-year period. See Antidumping Methodologies, 71 FR at 61720. However, because the overall number of countries being considered in the regression methodology was much larger than the list of countries now being considered in the Department’s calculations, the pool of wage rates from which we could draw from two years-worth of data was still significantly larger than the pool from which we may now draw using five years worth of data (in addition to the base year). The Department believes it is acceptable to review ILO data up to five years prior to the base year as necessary (as we have previously), albeit adjusted using the Consumer Price Index. See Expected Non-ME Wages: Request for Comment on Calculation Methodology, 70 FR 37761, 37762 (June 30, 2005). In this manner, the Department will be able to capture the maximum amount of countries that are significant producers of comparable merchandise, including those countries that choose not to report their data on an annual basis. See also Wage Data Memorandum for CPI data obtained from the International Monetary Fund’s International Financial Statistics.

<sup>46</sup> See International Labour Organization’s Yearbook of Labour Statistics.

minimum wage rate.<sup>47</sup> Therefore, the Department finds that the reported wage rate for Honduras is unreliable and is rejecting the Honduran wage rate for the purposes of averaging surrogate wage rates in this investigation.

The Department relied on data from the following countries to arrive at its wage rate in this final determination: Albania, Ecuador, Egypt, El Salvador, Fiji, Guatemala, Guyana, India, Indonesia, Jordan, Mongolia, Nicaragua, Peru, the Philippines, Sri Lanka, Thailand, and Ukraine. The Department calculated a simple average of the wage rates from these 17 countries. This resulted in a wage rate derived from comparable economies that are also significant producers of the comparable merchandise, consistent with the CAFC's ruling in Dorbest and the statutory requirements of section 773(c) of the Act.

## **Comment 6: The Appropriate Financial Statements**

Background: At the Preliminary Determination, we used three financial statements to calculate the surrogate financial ratios: Oil Country Tubular Limited ("OCTL"), ISMT Limited ("ISMT"), and Tata Steel, Ltd. ("Tata Steel"). Also, we note that at the Preliminary Determination, the following two additional financial statements were on the record: (1) Visa Steel; and (2) Neelachal Ispat Nigam, Ltd. After the Preliminary Determination, the parties placed on the record the following three additional financial statements: Jindal Steel and Power, Ltd. ("Jindal Steel"), Lloyds Line Pipe ("Lloyds"), and Maharashtra Seamless, Ltd.

- Petitioners contend that the Department should not use ISMT's 2008-09 financial statements in its calculation of the surrogate financial ratios for the final determination because: (1) its seamless pipe division operated at a loss; (2) it received subsidies (Advance Licenses); and (3) it operated under a Corporate Debt Restructuring ("CDR") program, which distorted its overhead expense, SG&A, and profit ratios. Petitioners acknowledge that the Department used ISMT's financial statements in OCTG from China, but contend that there is evidence on the record of this investigation, which was not on the record of the OCTG from China investigation, which further indicate that the ISMT financial statements should not be used. Petitioners state that ISMT has filed an antidumping investigation against seamless pipe from the China, and that, in that investigation, ISMT has claimed that its profit margin was artificially depressed as a result of dumped merchandise from China. Petitioners argue that, if the Department uses the ISMT financial statements, which indicate an artificially-depressed profit margin, it would result in an artificially depressed NV in this investigation, and would be distortive.
- Petitioners contend that in OCTG from China, the Department rejected ISMT's financial statements because of evidence that it received subsidies and that its subsidies result in an adjustment to its raw material costs rather than as a benefit under other income and, therefore, the Department could not quantify or remove the Advance Licenses benefits from the financial ratios, but nevertheless determined to use ISMT's financial ratios in its

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<sup>47</sup> See Memorandum to the File through Howard Smith, program manager, regarding "Honduras Data on Labor Wage Rate," dated August 10, 2010.

surrogate financial ratios. In contrast, Petitioners argue that Tata Steel's 2008-09 financial statements do not reflect any subsidies. While Tata Steel's financial statements list an export incentive under the Duty Entitlement Pass Book Scheme ("DEPB"), Petitioners contend that there is no corresponding subheading under other income, where the DEPB would be recorded. Petitioners disagree with the Department's determination in OCTG from China that Tata Steel received DEPB benefits during the 2008-09 fiscal year. However, assuming that Tata Steel did receive DEPB benefits, the benefits either have no impact on Tata Steel's financial ratios or can be easily addressed by excluding other income from the financial ratios.

- Hengyang argues that Tata Steel's financial statements should not be used to calculate Hengyang's surrogate financial ratios because Tata Steel: (1) does not produce subject merchandise and produces only a small amount of comparable merchandise;<sup>48</sup> (2) is a much more integrated steel company than Hengyang;<sup>49</sup> (3) received subsidies via its iron ore and coal mines and, thus, its raw material costs are distorted;<sup>50</sup> (4) its financial statements are more akin to a global company than an Indian one;<sup>51</sup> and (5) its financial ratios are aberrational. Regarding integration, Hengyang asserts that Hengyang and TPCO are not at the same level of integration, and so the use of different financial statements to calculate financial ratios for Hengyang and TPCO may be appropriate, as in the preliminary determination of OCTG from China.<sup>52</sup> Hengyang contends that ISMT and/or Maharashtra Seamless, Ltd. comprise the best data on the record to use as surrogate financial ratios for Hengyang because Maharashtra Seamless, Ltd. is close to the same integration level as Hengyang. In addition, Hengyang recommends that Lloyds be used if the Department continues to use financial ratios from companies which produce comparable merchandise, not identical merchandise.
- TPCO argues that Tata Steel's financial statements should not be used to calculate TPCO's surrogate financial ratios because Tata Steel: (1) does not produce subject merchandise nor comparable merchandise (Tata Steel produces welded pipes and tubes while TPCO produces seamless standard, line, or pressure pipe);<sup>53</sup> (2) is a much more

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<sup>48</sup> See Carbazole Violet Pigment 23 from the People's Republic of China: Notice of Final Determination of Sales at Less than Fair Value, 69 FR 67304 (November 17, 2004) ("CVP 23 from China"); Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 68 FR 6712 (February 10, 2003) ("Persulfates from China"); Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less than Fair Value, 73 FR 33977 (June 16, 2008) ("Nails from China").

<sup>49</sup> See Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 39921 (August 10, 2009) ("CTL Plate from China"); Notice of Final Determination of Sales at Less than Fair Value: Chlorinated Isocyanurates from the People's Republic of China, 70 FR 24502 (May 10, 2005).

<sup>50</sup> See Certain Hot-Rolled Carbon Steel Flat Products From India: Final Results of Countervailing Duty Administrative Review, 73 FR 40295, 40297 (July 14, 2008) ("Hot Rolled from India 2008").

<sup>51</sup> See Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 73 FR 76336 (December 16, 2008).

<sup>52</sup> See Certain Oil Country Tubular Goods from the People's Republic of China: Notice of Preliminary Determination of Sales at Less than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination, 74 FR 59117 (November 17, 2009).

<sup>53</sup> See CVP 23 from China at Comment 7; Persulfates from China; CTL Plate from China.

integrated steel company than TPCO;<sup>54</sup> and (3) received subsidies in a Department administrative review<sup>55</sup> and also via its captive iron ore and coal mines and these subsidies have distorted Tata Steel's financial ratios. As an alternative, TPCO contends that ISMT is the most appropriate surrogate because: (1) it produces the identical product TPCO produces; (2) is at the same level of integration as TPCO; (3) the Department has never found subsidies for ISMT in any countervailing proceeding; and (4) it is not clear that ISMT received benefits from the advanced licenses scheme nor that the Department would find this program still had countervailable benefits if investigated today.

- In Petitioners' rebuttal to Hengyang, Petitioners argue that Maharashtra Seamless, Ltd. should not be used to calculate Hengyang's financial ratios because Maharashtra Seamless, Ltd.: (1) is not an integrated steel producer; (2) received subsidies; (3) has distorted profits due to dumped PRC seamless pipe. Petitioners argue that the Department should not use Lloyds because it does not show a profit after "other income" is excluded, its financial statement covers only five months of the fiscal year, and it had an abnormally low level of production and sales. Petitioners' rebut Hengyang's arguments against the use of Tata Steel, stating that the Department used Tata Steel in its surrogate financial ratios calculation in OCTG from China, where it rejected the same arguments raised by Hengyang here. First, Petitioners argue that Tata Steel should be used because: (1) Tata Steel produces comparable merchandise, and there is no requirement that the Department use the financial statements of companies that only produce identical merchandise;<sup>56</sup> (2) contrary to Hengyang's assertion, 90% of the merchandise which Tata Steel produces is comparable to subject merchandise; (3) Tata Steel is at a similar level of integration to Hengyang, arguing also that Hengyang was more integrated during the POI than it claims; and (4) Tata Steel did not receive countervailable subsidies, or, if it did receive DEPB benefits, this would have been recorded in "Other income" and does not impact overhead or SG&A. Petitioners also rebut Hengyang's argument that Tata Steel's financial statements represent a "global" company by asserting that the financial statements are unconsolidated and do not include subsidiary companies located outside of India. Petitioners argue that Tata Steel's financial statements are not aberrational and that it is contrary to the Department's practice to perform a line-by-line analysis of each expense in the company's financial statements.<sup>57</sup>
- In Petitioners' rebuttal to TPCO, Petitioners contend that the Department should not use ISMT's 2008-09 financial statements for the final determination because for the reasons included in its affirmative case brief. Petitioners contend that in OCTG from China, the Department found that ISMT's receipt of subsidies result in an adjustment to its raw

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<sup>54</sup> See Nails from China at Comment 35; Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 Fr 14514 (March 31, 2009); Lightweight Thermal Paper from the People's Republic of China, 73 FR 57329 (October 2, 2008); Antidumping Manual, Chapter 10.

<sup>55</sup> See Hot-Rolled Steel from India 2008.

<sup>56</sup> See Wire Decking from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 75 FR 32905 (June 10, 2010) ("Wire Decking from China") at Comment 2.

<sup>57</sup> See OTR Tires from China at Comment 18.F.

material costs rather than as a benefit under other income and, therefore, the Department cannot quantify or remove the Advance Licenses benefits from the financial ratios. Petitioners contend that while Tata Steel's financial statements list an export incentive under the DEPB, there is no corresponding subheading under other income, where the DEPB would be recorded. Petitioners disagree with the Department's determination in OCTG from China that Tata Steel received DEPB benefits during the 2008-09 fiscal year. However, assuming that Tata Steel did receive DEPB benefits, Petitioners argue that the benefits either have no impact on Tata Steel's financial ratios or can be easily addressed by excluding other income from the financial ratios. Petitioners' rebuttal to TPCO's additional arguments are as follows: (1) Tata Steel's acquisition of Corus Steel was not an extraordinary event in terms of Tata Steel's production process because it did not impact Tata Steel's production of identical or comparable merchandise and the Department has explicitly rejected the argument that the acquisition of another company constitutes an extraordinary event when the acquisition does not affect the potential surrogate's production of identical or comparable merchandise;<sup>58</sup> (2) Tata Steel's captive mining is an opportunity cost for the company which reduces profit, which the Department has already determined in Hot-Rolled Steel from India 2008,<sup>59</sup> and (3) Tata Steel's financial ratios calculated by the Department in the Preliminary Determination are based on Tata Steel's unconsolidated financial statements which do not include subsidiary companies, such as Tata Steel Europe, Tata Korf Engineering Services, Ltd. and Tata Global Mineral Holdings Pte., Ltd.<sup>60</sup>

- In Hengyang's rebuttal, Hengyang contends that there is no final determination on whether there is dumping and/or injury caused by PRC exports to India and, therefore, the Department cannot consider this argument until after there is a finding of injury by Indian authorities. Hengyang argues that the Indian antidumping investigation of seamless pipe from China was much broader than this investigation, and includes OCTG. Also, Hengyang contends that there is no indication as to how ISMT reported profits to the Indian authorities for that investigation, and that ISMT's financial statements on the record of this investigation indicate that they were profitable. Hengyang reiterates that Tata Steel should not be used because its receipt of subsidies resulted in an increase to the financial ratios, and noted that, for Tata Steel, the Department recently determined a subsidy rate of 577.28 percent.<sup>61</sup>
- In TPCO's rebuttal to Petitioners regarding ISMT, TPCO contends that Petitioners have not identified one case where the Department rejected use of a financial statement because, allegedly, the company experienced a segment loss in the division corresponding to the subject merchandise. Rather, Department practice is to contemplate

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<sup>58</sup> See Notice of Final Determination of Sales at Less Than Fair Value: Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China, 69 FR 35296 (June 24, 2004), and accompanying Issues and Decision Memorandum at Comment 10.

<sup>59</sup> See Hot-Rolled Steel from India 2008 at Comment 26.

<sup>60</sup> See Tata Steel's 2008-09 financial statement at 218-227.

<sup>61</sup> See Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty Administrative Review, 75 FR 43488 (July 26, 2010).

rejecting use of a particular financial statement only if the financial statement itself demonstrates that the company was not profitable during the fiscal year. In addition, TPCO counters that ISMT's tube segment was profitable. Also, Petitioners, according to TPCO, have not provided record evidence that the Indian antidumping petition has discredited ISMT as a surrogate company. TPCO contends that ISMT's countervailable benefits are de minimis and are substantially less than the recurring subsidies that the Department found Tata Steel had received. TPCO contends that ISMT has emerged from the Indian Corporate Debt Restructuring program prior to the 2008-09 fiscal year and, therefore, there is no evidence that that impacted ISMT's net profit margin or its interest costs. In contrast, TPCO contends that Tata Steel's interest costs are not representative of an integrated domestic Indian steel producer because of its interest costs obtained to finance its purchase of Corus.

### **Department's Position:**

The Department has determined to base the surrogate financial ratios on financial statements from Jindal Steel, OCTL, and Lloyds. Before the Preliminary Determination, parties placed five financial statements on the record, ISMT, OCTL, Tata Steel, Visa Steel, and Neelachal Ispat Nigam, Ltd. For the Preliminary Determination, the Department found three financial statements (ISMT, OCTL, and Tata Steel) to be complete, legible, publicly-available, contemporaneous with the POI, and from producers of either identical or comparable merchandise. However, while all three of the financial statements at issue are contemporaneous with the POI, none of them are individually sufficient to meet all of the Department's criteria for an appropriate surrogate financial statement. For the Preliminary Determination, the Department used the average of the audited financial statements of all three Indian producers, ISMT, OCTL, and Tata Steel, to calculate surrogate financial ratios for TPCO and Hengyang for purposes of the Preliminary Determination.

After the Preliminary Determination, the following three additional financial statements were placed on the record: Jindal Steel, Lloyds, and Maharashtra Seamless, Ltd. The parties have raised arguments regarding the appropriate surrogate financial statements with which to value manufacturing overhead, SG&A expenses, and profit. The Department has evaluated the appropriateness of using each of the financial statements addressed by the parties for the final determination, below.

For the reasons discussed herein, for the final determination, the Department is calculating the surrogate financial ratios for TPCO and Hengyang using the financial statements of Jindal Steel, Lloyds, and OCTL (2008-09 fiscal year). The statute directs the Department to base the valuation of the FOP on "the best available information regarding the values of such factors in a ME country or countries considered to be appropriate ..." <sup>62</sup> Moreover, in valuing such factors, Congress further directed the Department to "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices." <sup>63</sup>

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<sup>62</sup> See section 773(c)(1) of the Act.

<sup>63</sup> See Omnibus Trade and Competitiveness Act of 1988, H.R. Conf. Rep. No. 76 100<sup>th</sup> Cong., 2<sup>nd</sup> Session (1988) at 590; and see, e.g., Lightweight Thermal Paper from the People's Republic of China: Final Determination of Sales at



Section 501.408(c)(4) of the Department's regulations further stipulates that the Department normally will value manufacturing overhead, SG&A expenses and profit using "non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country." In complying with the statute and the regulations, the Department calculates the financial ratios based on contemporaneous financial statements of companies producing comparable merchandise from the surrogate country, some of which may contain evidence of subsidization. However, where the Department has reason to believe or suspect that the company producing comparable merchandise may have received actionable subsidies, it may consider that the financial ratios derived from the company's financial statements are less representative of the financial experience of the relevant industry than the ratios derived from financial statements that do not contain evidence of subsidization. Consequently, the Department does not rely on financial statements where there is evidence that the company received countervailable subsidies and there are other sufficient reliable and representative data on the record for purposes of calculating the surrogate financial ratios.<sup>64</sup>

In choosing surrogate financial ratios, it is the Department's policy to use data from market-economy surrogate companies based on the "specificity, contemporaneity, and quality of the data."<sup>65</sup> Guidance regarding SVs for manufacturing overhead, general expenses, and profit is provided by section 351.408(c)(4) of the Department's regulations, which states that these values will normally be based on public information from companies that are in the surrogate country and that produce merchandise that is identical or comparable to the subject merchandise.<sup>66</sup> While the statute does not define "comparable merchandise," it is the Department's practice, where appropriate, to apply a three-prong test that considers: (1) physical characteristics; (2) end-uses, and (3) production processes.<sup>67</sup> In the selection of surrogate producers, the Department may consider how closely the surrogate producers approximate the NME producers' experience.<sup>68</sup> The courts have held that the Department is neither required to "duplicate the exact production experience of the PRC manufacturers," nor undergo "an item-by-item analysis in calculating factory overhead."<sup>69</sup>

Accordingly, in light of the parties' arguments, the Department has re-examined the 2008-09 financial statements on the record, listed above, for purposes of identifying the best available information to value TPCO's and Hengyang's overhead, SG&A expenses and profit for purposes of this final determination and find the following.

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Less than Fair Value, 73 FR 57329 (October 2, 2008) ("Lightweight Thermal Paper from China") at Comment 2.

<sup>64</sup> See OCTG from China at Comment 13.

<sup>65</sup> Id.; Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 FR 44827 (August 9, 2007), and accompanying Issues and Decision Memorandum at Comment 1.

<sup>66</sup> OCTG from China at Comment 13.

<sup>67</sup> See Certain Woven Electric Blankets From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 75 FR 38459 (July 2, 2010) at Comment 2.

<sup>68</sup> See Rhodia, Inc. v. United States, 240 F. Supp. 2d 1247 (CIT 2002).

<sup>69</sup> See Nation Ford Chem. Co. v. United States, 985 F. Supp. 133 (CIT 1997); Magnesium Corp. of Am. v. United States, 166 F.3d 1364, 1372 (Fed. Cir. 1999).

### *Contemporaneity*

Seven of the eight financial statements cover the fiscal period April 1, 2008 through March 31, 2009, while Lloyds has a fiscal year period from November 1, 2008, to March 31, 2009. Therefore, all eight financial statements cover three months of the POI, which is January 1, 2009 through June 30, 2009.

### *Specificity: Identical/Comparable Merchandise*

The Department has reviewed the financial statements of all eight companies and has determined that only Maharashtra Seamless, Ltd. produces identical merchandise to TPCO and Hengyang because Maharashtra Seamless, Ltd. produces seamless pipes and tubes.<sup>70</sup> The Department has also determined that Tata Steel, OCTL, ISMT, Jindal Steel, and Lloyds produce comparable merchandise. Specifically, Tata Steel produces hot-rolled coils and strips, cold-rolled coils, semi-finished steel, rolled/forged bars and structural steel;<sup>71</sup> OCTL produces drill pipe, production tubing and casing pipes;<sup>72</sup> ISMT produces stainless steel bar<sup>73</sup> and seamless hollows and tubes and steel bar;<sup>74</sup> Jindal Steel produces hot-rolled plates and coils, columns, fabricated beams, channels, billets, semi-products (rounds), long track rails;<sup>75</sup> and Lloyds produces steel tubes and pipes.<sup>76</sup> However, Visa Steel<sup>77</sup> and Neelachal Ispat Nigam, Ltd.<sup>78</sup> produce pig iron but not steel and, therefore do not produce merchandise comparable to TPCO and Hengyang.

### *Level of Integration*

In examining the financial statements on the record of this investigation, the Department finds that the potential surrogate companies are extremely varied in their respective levels of integration, which are as follows: Tata Steel's steel operations begin with mining (i.e., iron ore and coal), and it owns the mines, and continues with steelmaking all the way through to producing a finished product (hot-rolled coils and strips, cold-rolled coils, semi-finished steel, rolled/forged bars and structural steel); Jindal Steel's steel operations begin with mining (but with no evidence that it consumes what it mines), continuing through steel making and then producing hot-rolled plates and coils, columns, fabricated beams, channels, billets, semi-products (rounds), and long track rails, however, Jindal Steel also produces electricity;<sup>79</sup> ISMT<sup>80</sup> does not

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<sup>70</sup> See Hengyang's June 7, 2010, SV submission, at Exhibit 5, which has Maharashtra Seamless, Ltd.'s financial statement at 31 and a company profile from <http://www.jindal.com/msl-group.htm>.

<sup>71</sup> See United States Steel Corporation's January 20, 2010, SV submission at Exhibit A, Tata Steel's 2008-09 financial statement at 193-194.

<sup>72</sup> See Hengyang's February 12, 2010, SV submission, at Exhibit 1, OCTL's 2008-09 financial statement at 42; see also United States Steel Corporation's June 7, 2010, SV submission at Exhibit L at 1.

<sup>73</sup> See United States Steel Corporation's June 7, 2010, SV submission at Exhibit K at 2.

<sup>74</sup> See TPCO's February 16, 2010, SV submission at Exhibit SV-44, OCTL's 2008-09 financial statement at 38.

<sup>75</sup> See United States Steel Corporation's June 17, 2010, SV submission at Exhibit 30.

<sup>76</sup> See Hengyang's June 7, 2010, SV submission at Exhibit 6.

<sup>77</sup> See TPCO's February 16, 2010, SV submission at Exhibit 17, Visa Steel's 2008-09 financial statement and see also United States Steel Corporation's March 26, 2010, factual information submission at Exhibit 5.

<sup>78</sup> Id. at Exhibit 18, Neelachal Ispat Nigam, Ltd.'s 2008-09 financial statement and see also United States Steel Corporation's March 26, 2010, factual information submission at Exhibits 6 and 7.

<sup>79</sup> See United States Steel Corporation's June 17, 2010, SV submission at Exhibit 30, Jindal Steel's 2008-09

own any mines but uses steel and steel scrap to produce stainless steel bar<sup>81</sup> and seamless hollows and tubes and steel bar; OCTL processes already formed pipe, such as casing pipes, production tubing, and drill pipes to produce oil country tubular goods;<sup>82</sup> Lloyds processes hot-rolled and cold-rolled coils to produce steel tubes and pipes;<sup>83</sup> Maharashtra Seamless, Ltd. principally processes steel round billets to produces seamless pipes and tubes<sup>84</sup>; and Visa Steel and Neelachal Ispat Nigam, Ltd. produce pig iron but not steel, which is noted above in the *Specificity: Identical/Comparable Merchandise* section.

### *Subsidies*

The Department has reviewed each of the above financial statements and finds that three of them provide evidence of having benefitted from subsidies the Department has previously found to be countervailable. As discussed at the Preliminary Determination, record evidence continues to support a finding that Tata Steel<sup>85</sup> and ISMT<sup>86</sup> benefitted from actionable subsidies during this period. Accordingly, the Department does not need to address the arguments regarding subsidies found for Tata Steel in another, non-contemporaneous period, because the financial statements from the 2008-09 fiscal year already provide evidence of subsidies. We disagree with Petitioners' arguments that Tata Steel did not receive subsidies. Tata Steel's 2008-09 financial statement, at 169, clearly states: "Export incentive under the Duty Entitlement Pass Book Scheme has been recognized on the basis of credits afforded in the pass book." Consistent with Department practice, the Department does not rely on financial statements where there is evidence that the company received countervailable subsidies and there are other sufficient reliable and representative data on the record (Jindal Steel, Lloyds and OCTL) for purposes of calculating the surrogate financial ratios.<sup>87</sup> Hence, Petitioners' arguments to attempt to adjust Tata Steel's financial ratios are moot. Also, Petitioners' argue that despite the statement in Tata Steel's financial statement about the DEPB Scheme, any indication that Tata Steel received subsidies would appear as a line item under "Other income" in their financial statements yet there is no such line item or any evidence in any of the line items that Tata Steel received any

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financial statements at 2, 15, and 66-68.

<sup>80</sup> See TPCO's February 16, 2010, SV submission at Exhibit SV-44, ISMT's 2008-09 financial statements at 6, 11, and 39, see also United States Steel Corporation's March 26, 2010, factual information submission at Exhibit 48.

<sup>81</sup> See United States Steel Corporation's June 7, 2010, SV submission at Exhibit K at 2.

<sup>82</sup> See Hengyang's February 12, 2010, SV submission at Exhibit 1, OCTL's 2008-09 financial statements at 43 and 50, where the raw material consumed is casing pipes, production tubing, and drill pipes to produce oil country tubular goods.

<sup>83</sup> See Hengyang's June 7, 2010, SV submission at Exhibit 6, Lloyds' 2008-09 financial statements at Schedule P, where raw materials consumed is hot-rolled and cold-rolled coils, which are used to produce steel tubes and pipes.

<sup>84</sup> See Hengyang's June 7, 2010, SV submission at Exhibit 5, Maharashtra Seamless, Ltd.'s 2008-09 financial statements at 31, where steel round billets are noted as a major input and also plans to build an integrated steel plant; see also United States Steel Corporation's June 17, 2010, SVs submission at Exhibit 4.

<sup>85</sup> See United States Steel Corporation's January 20, 2010, SV submission at Exhibit A, Tata Steel's 2008-09 financial statements at 169, under Schedule M 1(b)(ii) Revenue Recognition, which states: "Export incentive under the Duty Entitlement Pass Book Scheme has been recognized on the basis of credits afforded in the pass book."

<sup>86</sup> See TPCO's February 16, 2010, SV submission at Exhibit SV-44, ISMT's 2008-09 financial statements at 32, Schedule 20, under Import Entitlement, which states: "The Company is entitled to import duty free raw material under Advance Licenses issued to the Company under the Duty Exemption Scheme or Claim duty drawbacks on Exports of the goods manufactured by it."

<sup>87</sup> See Lightweight Thermal Paper from China at Comment 2.

countervailable subsidies from the DEPB Scheme.<sup>88</sup> We disagree with Petitioners as the Department's practice is that if there is evidence of a specific countervailable program listed in a company's financial statement, either as a line item (with a corresponding numeric figure) and/or in the notes section, the Department will determine that the company received countervailable subsidies for that program. Because there is evidence that Tata Steel received countervailable subsidies from the DEPB Scheme, as detailed in the notes section of Tata Steel's 2008-09 financial statements, the Department determines that Tata Steel received countervailable subsidies.

The Department also finds that Maharashtra Seamless, Ltd. benefitted from actionable subsidies during this period. Tata Steel and Maharashtra Seamless, Ltd.<sup>89</sup> benefitted from the DEPB Scheme, which the Department has found to be countervailable.<sup>90</sup> ISMT benefitted from the Advanced Licenses program, which the Department has found to be countervailable.<sup>91</sup> However, the Department does not agree with the Petitioners that the record supports a conclusion that ISMT participated in a CDR program because there is no evidence in ISMT's 2008-09 financial statement that it is still under the CDR program and Petitioners' evidence states that ISMT was coming out of the CDR program, as of March 2008.<sup>92</sup> In addition, the Department disagrees with TPCO's arguments to use ISMT because, in a recent investigation of a steel product, the Advanced Licenses program was found to confer a de minimis countervailable subsidy. However, consistent with Department practice, the Department does not rely on financial statements where there is evidence that the company received countervailable subsidies and there are other sufficient reliable and representative data on the record (Jindal Steel, Lloyds and OCTL) for purposes of calculating the surrogate financial ratios.<sup>93</sup>

Finally, the Department continues to find, as in the Preliminary Determination, that OCTL's financial statement does not provide any evidence that it benefitted from subsidies the Department has previously found to be countervailable. Also, we find no evidence of subsidies for Jindal Steel,<sup>94</sup> Lloyds, Visa Steel, and Neelachal Ispat Nigam, Ltd.

### *Selection of Surrogate Statements*

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<sup>88</sup> See United States Steel Corporation's rebuttal brief, July 21, 2010, at 15-16.

<sup>89</sup> See Hengyang's June 7, 2010, SV submission at Exhibit 5, Maharashtra Seamless, Limited's 2008-09 financial statements at 51, Schedule 13, under other income, which states: "Income from DEPB Licence (sic)."

<sup>90</sup> See Final Affirmative Countervailing Duty Determination: Carbazole Violet Pigment 23 From India, 69 FR 67321 (November 17, 2004) and accompanying Issues and Decision Memorandum at Comment IV.A.1.b; see, also, United States Steel Corporation's January 20, 2010, SV submission at Exhibit A, Tata Steel's financial statements, Exhibit A at 169.

<sup>91</sup> See Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From India, 66 FR 49635 (September 28, 2001), and accompanying Issues and Decision Memorandum at I.C.

<sup>92</sup> See TPCO's June 7, 2010, SV submission, at Exhibit 43.

<sup>93</sup> See Lightweight Thermal Paper from China at Comment 2.

<sup>94</sup> See United States Steel Corporation's June 17, 2010, SV submission at Exhibit 30, Jindal Steel's 2008-09 financial statements at 140, under export benefits, which states: "Export benefits available under the Export Import policy of the Government of India are accounted for in the year of export, to the extent measurable." Because this is not a specific countervailable subsidy program determined by the Department to confer countervailable benefits, the Department determines that there is no evidence that Jindal Steel received countervailable subsidies, based on its 2008-09 financial statements.

In examining the eight financial statements at issue to determine which best met the statutory directive to base the valuation of the FOP on the best available information, the Department determined that while all eight of the financial statements at issue are contemporaneous, only three (Jindal Steel, OCTL, and Lloyds) meet the Department's criteria, except for differences in their production experiences. The Department disagrees with Petitioners that record evidence indicates that the other income line item (miscellaneous receipts) in Lloyds' financial statement is a non-operating income item. We do not find that there is a reason to deduct this line item from Lloyds' financial statement. Therefore, without deducting this miscellaneous receipts line item from profit, Lloyds made a profit in the fiscal year. Also, the Department disagrees with Petitioners that Lloyds' should not be used because Lloyds allegedly had minimal production. Petitioners have not provided any evidence that this so-called low production has distorted Lloyds' financial statements. The Department has eliminated those companies' financial statements where there is evidence they: (1) received subsidies (Tata Steel, ISMT, and Maharashtra Seamless, Ltd.); (2) recorded a loss<sup>95</sup> (Visa Steel<sup>96</sup>); and (3) do not produce steel products (Neelachal Ispat Nigam, Ltd. and Visa Steel). We have not relied on Tata Steel, ISMT, and Maharashtra Seamless, Ltd. due to the evidence of countervailable subsidies because there are other reliable and representative data on the record for purposes of calculating surrogate financial ratios.<sup>97</sup>

Regarding Hengyang's argument that the Department should always choose the financial statements of a company which produces identical merchandise over a company which produces comparable merchandise, the Department does not agree. Because there are many criteria the Department analyzes to determine the best surrogate companies' financial statements, a company which produces identical merchandise may not be the best selection as a surrogate. In Persulfates from China and Nails from China, which were cases cited by Hengyang, the Department selected companies which produced identical merchandise because these financial statements were the best match based on the Department's criteria. However, in this case, Maharashtra Seamless, Ltd. is the only company which produces identical merchandise and, based on Hengyang's argument, this company should be selected as the surrogate company. However, Maharashtra Seamless, Ltd. received countervailable subsidies. Therefore, given the presence of countervailable subsidies, the Department is not using Maharashtra Seamless, Ltd.'s financial statements for TPCO's and Hengyang's surrogate financial ratios. Also, the arguments by parties on whether Tata Steel produces a high or low percentage of comparable merchandise is moot because the Department has determined that Tata Steel received countervailable subsidies and is therefore disqualified from consideration for use as a surrogate company, given that we have several companies' financial statements on the record which did not receive subsidies, recorded a profit, and produced comparable merchandise.

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<sup>95</sup> Petitioners argue that the Department should not use ISMT's 2008-09 financial statements because it incurred a loss in its seamless pipe division. However, the Department's practice is to determine whether the company incurred an overall loss and not specifically in a particular division. Therefore, since ISMT did not incur an overall loss, this particular criterion does not disqualify the company from consideration as a potential surrogate. However, we have determined not to use ISMT's financial statements for the reasons discussed above.

<sup>96</sup> See TPCO's February 16, 2010, SV submission at Exhibit SV-17, Visa Steel's 2008-09 financial statements at 28.

<sup>97</sup> See Lightweight Thermal Paper from China at Comment 2.

For the remaining three companies, Jindal Steel, OCTL, and Lloyds, the Department next examined specificity and level of integration, given that these companies neither received countervailable subsidies nor recorded a loss during the 2008-09 fiscal year. We have determined that the financial statements for these three companies are complete. Also, the Department determines that Petitioners' arguments about Lloyds' shortened fiscal year are without merit as the Department does not find that this shortened period results in distorted financial statements such that it cannot be used for purposes of calculating surrogate financial ratios for TPCO and Hengyang. Petitioners have not provided any evidence to support their allegations that the Lloyds financial statements are distorted other than the fact that Lloyds had a five month fiscal year. The Department finds that the five month fiscal year financial statement of Lloyds is not distorted because the financial statement is complete and includes all appropriate adjustments for the fiscal year, and the Department does not find any reason, such as concerns about seasonality, that would indicate that a five month period is distortive.

In this case, Jindal Steel, OCTL, and Lloyds each produce merchandise that is comparable to the subject merchandise. Thus, their financial statements are all representative of, though not identical to, the experience of TPCO and Hengyang in this regard. We do not agree with Hengyang that Hengyang's experience is different from TPCO's, such that it would warrant the use of a different financial statement for the calculation of surrogate financial ratios. For the final determination, we have determined to use the financial statements from three companies which represent different production experiences with varied levels of integration, some more integrated, others less integrated than respondents, which together approximate the experiences of both TPCO and Hengyang.

Based on the totality of our analysis, the Department determines that Jindal Steel, OCTL, and Lloyds are fully representative of the production experience of TPCO and Hengyang. Given the Department's preference for using multiple financial statements in order to determine surrogate financial ratios for manufacturing overhead, SG&A expenses, and profit,<sup>98</sup> the Department has used the average of Jindal Steel, OCTL, and Lloyds, to calculate surrogate financial ratios for TPCO and Hengyang in the final determination.

#### **Comment 7: The Appropriate Surrogate Value for Steel Billets**

- TPCO contends that the best available surrogate for valuing billets is the average price paid for billets by Maharashtra Seamless Ltd. since this average price is based on Maharashtra's purchases from both domestic and foreign suppliers and Maharashtra Seamless, Ltd. is the largest Indian producer of seamless pipes. Given that Maharashtra Seamless, Ltd. produces the product that is the subject of the instant investigation, TPCO alleges that Maharashtra Seamless, Ltd.'s billet prices are more specific to the billets it uses than any other information on the record.

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<sup>98</sup> See OCTG from China at Comment 13.

- If, however, the Department uses World Trade Atlas (“WTA”) data to value billets, TPCO maintains that it should base the value on Indian HTS category 7207.20.90 since imports under this category are specific to TPCO’s input.
- TPCO argues that Indonesian WTA data should not be used to value steel billets because the Department’s practice is to value inputs in a single country and there are no product descriptions on the record regarding whether the Indonesian import data reflects the product which TPCO uses.
- Hengyang contends that the SV for steel billet, Indian HTS 7207.20.30, that the Department used to value Hengyang’s billets in the Preliminary Determination is not correct, since the Department used a SV for steel billet specific to the manufacture of seamless pipe, but Hengyang uses steel billets that may be used for the manufacture of a variety of products. Further, Hengyang contends that the SV for steel billet that the Department used in the Preliminary Determination is based upon small-quantity import data (5 metric tons), and is aberrantly high in relation to other information on the administrative record. Hengyang notes that is the Department’s policy “to disregard small-quantity import data when the per-unit is substantially difference from the per-unit values of the larger quantity imports of that product from other countries.”<sup>99</sup> Therefore, Hengyang argues that the Department should value its billets using WTA data under Indian HTS 7207.20.90.
- Petitioners argue that the Department should use Indian imports under HTS 7207.20.30 to value the steel billets because it is more specific than Indian HTS 7207.20.90, which Petitioners argue is a basket category and includes many different products, according to Infodrive India data. Petitioners argue that, consistent with OCTG from China, the Department should reject a basket category in favor of a more specific category.<sup>100</sup> Petitioners also assert that the import data from HTS 7207.20.90 is aberrational when compared to other data under the same or similar HTS categories, including data from the United States and other surrogate countries.<sup>101</sup>
- Petitioners further argue that Indian import data under HTS 7207.20.30 are not aberrational and are consistent with benchmark data on the record (including export data), refuting TPCO’s contention that the category did not represent a large quantity of imports.<sup>102</sup>

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<sup>99</sup> See Shakeproof Assembly Components Division of Ill. Tool Works, Inc. v. United States, 23 CIT 479, 485, 59 F. Supp. 2d 1354, 1360 (1999).

<sup>100</sup> See OCTG from China at Comment 20; see also Chlorinated Isocyanurates from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 73 FR 159 (Jan. 2, 2008) at Comment 2; Wooden Bedroom Furniture from the People’s Republic of China: Final Results of Antidumping Administrative Review and New Shipper Review, 73 FR 49162 (Aug. 20, 2008) (“Wooden Bedroom Furniture from China”) at Comment 1.

<sup>101</sup> See e.g., Notice of Final Determination of Sales at Less than Fair Value: Carbazole Violet Pigment 23 from the People’s Republic of China, 69 FR 67304 (Nov. 17, 2004) at Comment 6.

<sup>102</sup> Final Determination of Sales at Less than Fair Value: Certain Artist Canvas from the People’s Republic of China, 71 FR 16116 (Mar. 30, 2006); Shanghai Foreign Trade Enterprises Co., Ltd. v. United States, 318 F. Supp. 2d 1339 (CIT 2004).

- Alternatively, Petitioners argue that the Department should use Indonesian import data under HTS subheading 7207.20.9900 because these data are more specific to TPCO and Hengyang's inputs than Indian import data under HTS 7207.20.90. Petitioners argue that the carbon content for Indonesian HTS 7207.20.9900 is capped at 0.6 percent whereas the carbon content for Indian HTS 7207.20.90 is not capped. Petitioners note that the Department has previously used data from more than one surrogate country if there is more precise data available for a principal input.
- Alternatively, Petitioners state that the Department should use Indonesian import data under HTS 7207.20.100 because the description of this HTS identifies steel billets as the imported product whereas the Indian import data proposed by TPCO are for "other" semi-finished steel products such as needle blanks, forgings and iron bars. Petitioners further note that the Department used this HTS category to value TPCO's steel billets in OCTG from China.<sup>103</sup> While Petitioners note that there were no imports into Indonesia under this HTS category during the POI, because these data are more specific, although not contemporaneous, it is the Department's practice to inflate the data.<sup>104</sup>
- Petitioners maintain that the Department will use data from more than one country that is economically comparable when the input in question is a "principal" input, the surrogate country produces comparable merchandise, and the data are more specific, as is the case for the Indonesian data in the instant investigation.<sup>105</sup>
- TPCO disagrees with Petitioners, noting that: (1) record evidence does not demonstrate that Indian HTS category 7207.20.30 is specific to the steel billets that it uses; (2) the Department's requirement that the WTA data used to value FOP be commercially significant is not satisfied here because there were only 5 MTs of imports during one month from one exporting country listed under HTS 7207.20.30;<sup>106</sup> and (3) Petitioners' reliance on export data to show that the value derived from HTS 7207.20.30 is not aberrational should be rejected because the Department does not use export data to value FOP.
- Further, contrary to Petitioners' claim, TPCO asserts that the fact that surrogate data comes from one company has never been a criteria in selecting SVs.<sup>107</sup>
- In rebuttal to Petitioners' argument that the data for HTS 7207.20.30 are not aberrational, Hengyang states that the Department has been required by the CIT to analyze whether a

<sup>103</sup> See OCTG from China at Comment 20.

<sup>104</sup> See Silicon Metal from China: Final Results of Antidumping Duty Administrative Review, 75 FR 1592 (Jan. 12, 2010) at Comment 8.

<sup>105</sup> See, e.g., Wooden Bedroom Furniture from China at Comment 1.D.

<sup>106</sup> See Notice of Final Determination of Sales at Less than Fair Value: Carbazole Violet Pigment 23 from the People's Republic of China, 69 FR 67304 (Nov. 17, 2004); OCTG from China at Comment 20.

<sup>107</sup> See Manganese Metal from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 65 FR 30067 (May 10, 2000) and accompanying Issues and Decision Memorandum at Comment 7.



price was aberrational, for quantities as high as 1,132 metric tons.<sup>108</sup> Hengyang also states that in OCTG from China, the Department rejected Indian import data under HTS 7207.20.30 as a SV because the quantity was 15 metric tons, whereas here the quantity is only 5 metric tons.

- Petitioners counter TPCO's position by claiming that prices from Maharashtra should not be used because they are not broad and representative of prices in India and the Department's practice is to value FOP using WTA data, not information from a single company.<sup>109</sup>
- Petitioners argue that imports under Indian HTS 7207.20.90 should not be used to value steel billets because: (1) record evidence shows that this is a basket category that includes non-comparable products used in applications other than the production of seamless pipe; (2) the Department rejected this HTS category as a value for steel billets in OCTG from China; (3) the SV derived from this HTS category is aberrant given that benchmark prices on the record are up to 189 percent higher than the value, and the average of the benchmark prices are 116 percent higher than this value.
- Petitioners claim that TPCO has provided nothing to undermine Indonesian import data beyond mere speculation that such data are not specific to the steel billets it uses. Petitioners also assert that in arguing for the use of surrogates from one country, TPCO has ignored the Department's practice of valuing principle inputs using data from other than the primary surrogate country when such data is more specific to the input.
- In rebuttal, Petitioners argue that Hengyang's suggested application of Indian HTS 7207.20.90 is a basket subheading that should be rejected because there are more specific SV data on the record. Petitioners cite data published by Infodrive India Pvt. Ltd., contending that Indian HTS 7207.20.90 consists of materials that are not comparable to steel billets. In contrast, Petitioners state that the SV for steel billets that the Department used in the Preliminary Determination is specific to the input being valued. Further, Petitioners state that Hengyang's benchmark price comparison for demonstrating that the Department's SV is aberrant is based on less-specific 6-digit HTS code data. Petitioners also state that the average unit value from Indian HTS 7207.20.90 is clearly aberrant in relation to other average unit values on the administrative record.
- Petitioners contend that the Department's practice is to only exclude SV data that do not represent a large quantity of imports when the resulting average unit value is aberrational. Petitioners argue that the Department's selected classification, HTS 7207.20.30, does not result in an aberrational average unit value when compared to other average unit values on the administrative record.

### **Department's Position:**

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<sup>108</sup> See Shanghai Foreign Trade Enterprises Co., Ltd. v. United States, 318 F. Supp. 2d 1339 (CIT 2004).

<sup>109</sup> See Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 73 FR 76336 (Dec. 16, 2008) at Comment 4.

For the final determination, the Department has determined that Indonesian import data<sup>110</sup> for HTS 7207.20.100, semi-finished products of iron or non-alloy steel – billets, provides the best available information for valuing steel billets.<sup>111</sup> When valuing the FOP, “it is the Department’s stated practice to use investigation or review period-wide averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data.”<sup>112</sup> HTS 7207.20.100 constitutes the best available information on the record. The Department has selected this HTS category because it specifically covers the input being valued – billets – while the other potential SVs on the record either are not as specific to the input as this HTS category or are not necessarily representative of a range of prices within the POI. Although the Department’s preference is to use a single surrogate country for consistency and predictability, the Department will, in the interest of achieving greater accuracy, look to a secondary surrogate country. Here, the Department finds that Indonesia, as a surrogate country, comports with the requirements of section 773(c) of the Act. Although, as Petitioners noted, the Indonesian data under HTS 7201.20.100 are not contemporaneous with the POI, the Department’s practice is to inflate data that are not contemporaneous with the POI.<sup>113</sup> As explained in more detail below, the Department finds these data preferable to the other potential SV data on the record and will inflate the Indonesian import data from HTS 7207.20.100 to make the data contemporaneous with the POI.

The Department did not select the other SV sources advocated by parties for the reasons noted below. The Department did not select Indonesian HTS 7207.20.9900 to value billets because this category, “semi-finished products of iron/non-alloy steel” is not as specific to billets as is Indonesian HTS 7207.20.100, semi-finished products of iron or non-alloy steel – billets. Also, we agree with Petitioners that Indian import data under HTS 7207.20.90 are not an appropriate SV source for steel billets because it is a basket category. The Department does not use a basket HTS category when it has more product-specific SV data on the record.<sup>114</sup> As the Department has determined that Indian HTS 7207.20.90 is not an appropriate SV source for steel billets for the reasons stated above, the Department finds it unnecessary to address Petitioners’ benchmark argument concerning this HTS category.

Further, the Department finds that data for Indian HTS 7207.20.30 are not the best available SV for steel billets. While the Department agrees with Petitioners that the description for Indian HTS 7207.20.30 is more specific to purchased steel billets used for seamless pipes, i.e.,

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<sup>110</sup> With respect to TPCO’s argument that the record does not contain product descriptions for Petitioners’ proposed Indonesian HTS categories, we disagree. Petitioners provided the product descriptions and SV data for Indonesian HTS 7207.20.100 and 7207.20.9900 in their June 7, 2010, submission of SV data at Exhibits D and E.

<sup>111</sup> See section 773(c) of the Act (stating that Commerce shall determine NV based on the FOP using the best available information).

<sup>112</sup> See TRBs from China 2009 at Comment 6.

<sup>113</sup> Petitioners provided import data under HTS 7207.20.100 for the period October- December 2008, which are the three months prior to the start of the POI.

<sup>114</sup> See, e.g., Frontseating Service Valves From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances, 74 FR 10866 (March 13, 2009) and accompanying Issues and Decision Memorandum at Comment 6.

“seamless steel tube quality,” this category may not be representative of global market prices. In OCTG from China,<sup>115</sup> the Department found that the limited quantity of Indian imports for HTS 7207.20.30 was inconsistent with the Department’s practice of selecting a SV that is, *inter alia*, representative of a broad range of prices within the POI<sup>116</sup> and thus commercially significant.<sup>117</sup> Similarly, in the instant investigation, we found that the small quantity of POI imports under Indian HTS 7207.20.30 indicate that this category is not representative of a range of prices within the POI; and thus we have determined that these data are not the best available SV for billets.

Finally, the Department disagrees with TPCO’s contention that Maharashtra Seamless, Ltd.’s billet prices are a suitable SV for steel billets. It is unclear whether the reference in Maharashtra Seamless, Ltd.’s financial statements to “steel bars” is in fact a reference to steel billets. Further, TPCO would have us compare Maharashtra’s purchase prices to TPCO’s surrogate import purchase prices, which include taxes. This comparison would be akin to disregarding the Department’s preference for using prices that are tax-exclusive.<sup>118</sup> The use of Maharashtra Seamless, Ltd.’s purchase prices would also disregard the Department’s preference for broad-market averages as discussed above.

#### **Comment 8: Appropriate Surrogate Value for Pig Iron**

- Hengyang argues that the SV for pig iron, WTA data under HTS category 7201.10.00, that the Department used in the Preliminary Determination should be rejected.<sup>119</sup> Hengyang argues that the value is aberrantly high (\$799 per MT) when compared with other benchmarks, such as Hengyang’s finished seamless pipe prices, ME purchase prices, import prices for other potential surrogate countries (Indonesia, Thailand, Philippines, and Ukraine), and U.S. and E.U. import prices. Hengyang and TPCO contend that the Indian imports from South Africa are distorting the Indian WTA import data because the South African prices are for a higher quality pig iron (*Sorelmetal*) than the lower quality pig iron used by respondents to produce subject merchandise. TPCO stated that it does not use *Sorelmetal* pig iron in its steel production but a less expensive pig iron. In addition, Hengyang contends that where the Department has found large

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<sup>115</sup> See OCTG from China at Comment 20.

<sup>116</sup> See Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People’s Republic of China, 36 FR 67304 (November 17, 2004).

<sup>117</sup> See Shanghai Foreign Trade Enterprises Co., Ltd. v. United States, 318 F. Supp. 2d 1339 (CIT 2004) (“CIT 2004”) (remanding to the Department in order to address whether the price for pig iron obtained from the Indian Import Statistics is based on a statistically or commercially insignificant quantity).

<sup>118</sup> See WBF-PRC Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People’s Republic of China, 69 FR 67313 (November 17, 2004) and accompanying Issues and Decision Memorandum at Comment 3.

<sup>119</sup> See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 74 FR 3987 (January 22, 2009) (“TRBs from China 2009”) and accompanying Issues and Decision Memorandum at 9 (where the Department stated that the HTS description is an important factor in the selection of a SV but it is not the sole consideration and cannot be relied upon when it produces unreasonable results. The unreasonable results were that the SV for the steel wire rod scrap exceeded the SV for the direct material input (steel wire rod) and, therefore, the Department did not use this steel wire rod scrap SV).

variations in the average unit values (“AUVs”) within an import category, such as large variation in the AUVs for the five countries comprising the Indian WTA import data,<sup>120</sup> the Department has rejected using that data.<sup>121</sup> TPCO also benchmarked the Indian import price to pig iron prices in India and other countries, arguing that the Indian WTA import price is distorted. As an alternative, Hengyang argues that Department should use import data from Thailand, Indonesia, or, as proposed by TPCO, the weighted-average Indian pig iron prices from the financial statements of several Indian pig iron producers.

- TPCO argues that the Indian imports of pig iron are only 1,630 metric tons and that this quantity is not a commercial quantity, especially considering that India produced over 5 million metric tons of pig iron. Therefore, the Department should not use HTS code 7201.10 for the final determination.
- In rebuttal, the Petitioners argue that the Indian import prices under HTS code 7201.10.00 that the Department used in the Preliminary Determination meet all of the Department’s criteria for publicly available, contemporaneous, non-export, tax-exclusive, and product-specific prices. The Petitioners contend that the Department’s Preliminary Determination is consistent with its prior decisions with respect to pig iron inputs, such as in OCTG from China and in a remand upheld by the court,<sup>122</sup> where the Department determined that *Sorelmetal* pig iron should not be distinguished from other grades of pig iron, and is not fundamentally different than other types of pig iron. The Petitioners argue that Hengyang and TPCO have not met the burden required for undermining the validity of the pig iron SV. The Petitioners argue that the SV used by the Department in the Preliminary Determination does not appear aberrational, even compared to other AUVs on the administrative record. Also, the Petitioners contend that TPCO’s proposed SV, pig iron prices from several Indian pig iron producers’ financial statements, are not more specific than WTA data because TPCO’s data are from specific Indian companies and are not broad-based.

### Department’s Position:

The Department disagrees with Hengyang and TPCO. With respect to factor valuation, the Department is obligated to calculate an accurate dumping margin by using the best available information.<sup>123</sup> The Department selects the best available information based on the quality, specificity, and contemporaneity of the data. Normally, the Department will use publicly available information to value FOP.<sup>124</sup> With respect to the Department’s selection of SVs, “it is the

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<sup>120</sup> See Hengyang’s Case Brief at 25, where the variation in the Indian WTA import data ranges from a low of \$0.423 per kilogram (“kg”) from Malaysia to a high of \$1.643 per kg from Germany.

<sup>121</sup> See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Final Results of the 2007-2008 Administrative Review of the Antidumping Duty Order, 75 FR 844 (January 6, 2010) (“TRBs from China 2010”) and accompanying Issues and Decision Memorandum at Comment 6.

<sup>122</sup> See Final Results of Redetermination Pursuant to Court Remand in Longkou Haimeng Machinery Co., Ltd., et al. v. United States, Court No. 07-00321.

<sup>123</sup> See section 773(c)(1) of the Act; Honey from the People’s Republic of China, Final Results and Final Rescission, In Part, of Antidumping Duty New Shipper Review, 69 FR 64029 (November 3, 2004) at Comment 4.

<sup>124</sup> See 19 CFR 351.408(c)(1).

Department's stated practice to use investigation or review period-wide averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data."<sup>125</sup> With that in mind, the Department first attempts to find publicly available SVs from the primary surrogate country that are contemporaneous and representative of the factors being valued. In applying the Department's SV selection criteria as mentioned above, the Department has found in numerous NME cases that the import data from WTA represents the best available information for valuation purposes because they are an average of multiple price points within a contemporaneous period, are specific to the input being valued, and are tax-exclusive.<sup>126</sup>

In this case, the Department selected India as our primary surrogate country. Thus, the Department's preference in selecting SV data for this investigation is to utilize publicly available prices within India. Notwithstanding Hengyang's and TPCO's claims, the Department does not agree that the WTA category that the Department relied on for the Preliminary Determination reflected aberrant or inappropriate SV data. Accordingly, for the reasons outlined below, the Department has determined to continue using HTS subheading 7201.10 to value Hengyang's and TPCO's pig iron inputs because the Department finds this to be the best available data on the record for purposes of the final determination.

The Department disagrees with Hengyang's and TPCO's contention that the Indian imports from South Africa are distorting the Indian WTA import data for HTS code 7201.10 because the South African prices are for a higher quality pig iron (*Sorelmetal*) than the pig iron used by respondents to produce subject merchandise. The Department has considered this argument in another case and determined that the steel grade, foundry grade, and *Sorelmetal* pig iron are not significantly dissimilar and that all are properly classified in Indian HTS 7201.10. In Brake Rotors from China,<sup>127</sup> the respondent argued that WTA Indian import statistics used by the Department were not representative of the type of pig iron consumed to produce subject merchandise. Specifically, the respondent argued that the existence of *Sorelmetal* in most Indian imports of pig iron was a distinguishing characteristic that invalidated the use of HTS subcategory 7201.10 to value pig iron in those final results of review. Upon remand, the Department undertook an extensive examination of the record with regard to pig iron imports into India. During the course of the remand, the Department re-evaluated the record evidence with respect to the metallurgical properties of *Sorelmetal*, concluding that *Sorelmetal* is a non-alloy pig iron and does not possess any qualities that would fundamentally distinguish it from the pig iron properly classified in HTS subheading 7201.10.<sup>128</sup> Based on this precedent and the facts on the record of this case, the Department has determined that Indian HTS category 7201.10, is an appropriate SV for foundry grade and steelmaking grade pig iron, such as that used by TPCO and Hengyang in the production of subject merchandise, and, thus, is specific to TPCO's and Hengyang's input.

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<sup>125</sup> See TRBs from China 2009 at Comment 6.

<sup>126</sup> See Diamond Sawblades and Parts Thereof from the People's Republic of China, Final Determination in the Antidumping Duty Investigation, 71 FR 29303 (May 22, 2006) and accompanying Issues and Decision Memorandum at Comment 11.

<sup>127</sup> See Brake Rotors From the People's Republic of China: Final Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of the 2005-2006 Administrative Review, 74 FR 42386 (August 2, 2007) ("Brake Rotors from China").

<sup>128</sup> See Longkou Haimeng (CIT 2009) (affirming the Department's Remand Determination).

TPCO and Hengyang have not presented any additional evidence to support their contention that Indian import values for HTS code 7201.10 are distorted or unrepresentative, besides the argument that the values are too high. Therefore, since TPCO and Hengyang have no additional evidence, the Department will not benchmark Indian import prices against import prices from the other potential countries because the Department's practice is only to examine benchmarks where a party provides a colorable claim, supported by evidence on the record to suggest that a particular SV is distorted or unrepresentative.<sup>129</sup>

The Department does not agree with Hengyang that the Indian import data should be rejected, as in TRBs from China 2009, because in that case, the SV for the scrap exceeded the SV for the direct material, indicating that the SV for scrap was unreasonable. Hengyang is attempting a comparison between the SV for pig iron with Hengyang's "EP for some of its finished steel product,"<sup>130</sup> although the comparison in this case does not indicate that the selection of a SV for pig iron is unreasonable.<sup>131</sup> As noted above, because we have determined that TPCO and Hengyang have no additional evidence that the Indian import values for HTS code 7201.10 are distorted or unrepresentative, the Department will not benchmark this Indian import value against other prices, including Hengyang's U.S. prices.

Also, the Department determines that the WTA import data is a superior source to the sources proposed by TPCO to value pig iron because it is a broad-based value, contemporaneous with the POI, net of taxes and publicly available. The value of pig iron from the financial statements of Indian pig iron producers are not broad-based, and are not tax exclusive.

Regarding TPCO's argument that the quantity of Indian imports of pig iron is not a commercial quantity, the Department disagrees. A comparison of the quantity of imports relative to the quantity of domestic production in the surrogate country does not establish that the imported quantity into that country is not a commercial quantity. TPCO has not provided any evidence that 1,630 metric tons, which is the quantity imported into India, is not a commercial quantity of pig iron.

Regarding Hengyang's argument that where the Department has found large variations in AUVs within an import category, the Department has rejected using such data (citing TRBs from China 2010), we disagree with Hengyang as Hengyang's reference to Comment 2 of TRBs from China is not on point.<sup>132</sup> There, the Department compared Infodrive data with WTA data but did not compare variations in the data within the same data source, such as variations with the WTA data, which Hengyang contends, based on Hengyang's citation to Comment 2. However, the Department agrees with Hengyang that the Department, in TRBs from China 2010, at Comment 3, did reject using Indian import data because, after an analysis of the Indian import country-

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<sup>129</sup> See TRBs from China 2009 at Comment 6; Lightweight Thermal Paper from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 57329 (October 2, 2008), and accompanying IDM at Comment 10, "...{w}here a party provides sufficient evidence on the record to suggest that a particular SV is aberrational or otherwise inappropriate for use, the Department examines appropriate benchmarks to test the reliability of that value."

<sup>130</sup> See Hengyang case brief at 23.

<sup>131</sup> Id.

<sup>132</sup> Id. at 25, citing TRBs from China 2010, Comment 2.

specific AUVs data for HTS subcategory 7228.50.90, the Department determined that there were wide variations in the AUVs between individual countries listed as exporters in the data.<sup>133</sup> However, the Department's practice now is that the Department does not examine whether there are large variations in the Indian import data for the countries' AUVs without specific evidence that the data are unreliable, as detailed in Shrimp from China.<sup>134</sup> In fact, as stated in Shrimp from China, comparing one high value with a lower value – even a significantly lower value – is insufficient evidence that one value or the other is aberrational. In selecting SVs, the Department prefers to use broad-market averages, which might include variations in values. In the instant case, there are import data from five countries with a wide range of quantities and values, and it is not unusual to find a wide range of AUVs. In addition, Hengyang has not provided any historical data on the record to support its allegation that the divergent AUVs necessarily indicate that the Indian import data is unreliable.

### **Comment 9: The Appropriate Surrogate Value for Iron Ore and Iron Powder**

- TPCO argues that the factual information it has placed on the record demonstrate that Indian import data from the WTA for HTS categories 2601.11.90 and 2601.12, which were suggested by Petitioners and used by the Department, respectively, are not an appropriate source to value TPCO's iron ore and iron powder.
- TPCO contends that InfoDrive India data demonstrate that imports under HTS 2601.11.90 are not appropriate because they include not only iron ore, but also iron oxide and pulverized underground rock and that the total quantity of imports, 11 metric tons, is not commercially significant.
- TPCO also argues that the AUVs for iron ore imported under HTS categories 2601.11.90 and 2601.12 are significantly higher than iron ore prices from the following sources: steelonthenet.com, China Chamber of Commerce for Metals and Chemicals, Steelprices-India, and the average sales prices of two Indian producers of iron ore.
- TPCO argues that that the Department should value iron ore using a surrogate price of \$59.12, which is the weighted-average price of iron ore from the financial statements of two Indian companies that purchased iron ore to produce pig iron for steelmaking.
- TPCO notes that even the weighted-average price of iron ore from the financial statements of the two Indian companies is an overstated price since these prices include two quarters from calendar year 2008 while iron ore prices have dropped in calendar year 2009. TPCO argues that the average of the iron ore prices from these two companies is representative of the price for TPCO's iron ore purchases.

<sup>133</sup> See TRBs from China 2010 at Comment 3.

<sup>134</sup> See Administrative Review of Certain Frozen Warmwater Shrimp From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 75 FR 49460 (August 13, 2010), and accompanying Issues and Decision Memorandum at Comment 4.

- Petitioners argue that the benchmarks that TPCO uses to compare with the AUVs of Indian imports of iron ore are not appropriate under the Department's practice because they include prices from NME transactions and data from sources other than the WTA, which is not an apples-to-apples comparison. Therefore, Petitioners maintain that TPCO has failed to show that the WTA data at issue should be rejected.
- Petitioners claim that TPCO's argument concerning the small quantity of Indian imports should be rejected because the argument ignores the Department's normal practice, as upheld by the CIT, that the Department exercises discretion in examining whether such values are aberrational.<sup>135</sup>
- Petitioners argue that the Indian AUVs are not aberrational when compared to the AUV for Indonesian imports under the most similar HTS category, 2601.11.
- Petitioners contend that the Department should not rely on InfoDrive India's data submitted by TPCO because the InfoDrive's data account for less than 21 percent of the WTA data for the imports in question. According to Petitioners, the Department has determined in the past that InfoDrive data will not be used to analyze the reliability of WTA data when InfoDrive data accounts for less than 80 percent of the total import quantity reported in the WTA.<sup>136</sup>

### **Department's Position:**

The Department's practice when selecting SV information for valuing FOP, in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, SVs which are product-specific, representative of a broad market average price, publicly available, tax exclusive, and contemporaneous with the POI. While there is no hierarchy for applying the SV selection criteria, "the Department must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the "best" SV is for each input."<sup>137</sup> In the Preliminary Determination, the Department valued iron ore using WTA import data for India under subheading 2601.12 because it had insufficient evidence to conclude that TPCO's iron ore was materially different than the iron ore products imported into India under this HTS category. Also, in the Preliminary Determination, the Department valued iron ore powder based on the prices derived from the financial statements of two Indian companies consistent with what was done in OCTG from China.

For the final determination, the Department has determined that import data under Indian HTS 2601.12 are not the best available information for valuing TPCO's iron ore and iron ore powder.

<sup>135</sup> See Shanghai Foreign Trade Enterprises Co., Ltd. V. United States, 813 F. Supp. 2d 1339, 1350-51 (CIT 2004).

<sup>136</sup> See I&D Memo in Bearings from China at Comment 2, and I&D memo in Certain Activated Carbon from the PRC at Comment 3c.

<sup>137</sup> See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China, 73 FR 55039 (September 24, 2008), and accompanying Issues and Decision Memorandum at Comment 2; see also, Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People's Republic of China, 69 FR 67304 (November 17, 2004), and accompanying Issues and Decision Memorandum at Comment 3.



This category includes pellets, which is a different form of input than TPCO's iron ore and iron ore powder.

The Department also has determined that Indian HTS 2601.11.90 is not the best available information for valuing iron ore and iron ore powder because this HTS category reflects a relatively small volume of imports and thus it cannot be said to be a broad market average price. In addition, the description for this HTS category is "other non-agglomerated iron ore concentrates," which is a basket category under heading 2601.11 that is less specific than other SV information on the record. Consequently, the Department has determined not to use the WTA data to value TPCO's iron ore and iron ore powder.

On the other hand, the Department has found information from the financial statements for two Indian producers of pig iron, Kirloskar Ferrous Industries Limited and KIOCL Limited, to be product-specific, publicly available and contemporaneous with the POI. We find that this is the best available information on the record to value both iron ore and powder in comparison to the WTA data. In addition, the Department finds that this input is more specific to TPCO's iron ore and iron ore powder because the prices from the financial statements are specifically for iron ore lumps. Thus, using a simple average of the price of lump ore from the financial statements of Kirloskar Ferrous Industries Limited and KIOCL Limited is the best available information on the record for valuing TPCO's consumption of iron ore and powder.<sup>138</sup> This is consistent with our determination in OCTG from China, where we valued iron powder using financial statements from Indian producers.<sup>139</sup>

#### **Comment 10: The Appropriate Surrogate Value for Oxygen and Nitrogen**

- TPCO argues that the Department should not value oxygen and nitrogen by simply inflating 1996 unit prices for these gases from Bhoruka Gases Ltd., as it did in the Preliminary Determination, because: (1) changes in the technology used to produce oxygen and nitrogen could well have kept prices below the level of inflation; (2) oxygen and nitrogen are extracted from air, and this key input has no cost; (3) wage inflation is unlikely to affect the cost of oxygen or nitrogen since labor is a minor input in the production process; (4) electricity and depreciation are the two primary costs incurred to produce oxygen and nitrogen, but depreciation would only be affected by inflation if the producer built a new plant each year; and (5) the SV used by the Department in the Preliminary Determination is much higher than the other oxygen and nitrogen prices on the record.
- TPCO also claims the Department should not value oxygen and nitrogen using WTA data because: (1) TPCO uses industrial grade oxygen and nitrogen whereas record evidence indicates that imports under the Indian HTS numbers provided by Petitioners are oxygen

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<sup>138</sup> See Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China: Final Results of the 2007-2008 Administrative Review of the Antidumping Duty Order, 75 FR 8301 (February 24, 2010) and accompanying Issues and Decision Memorandum at Comment 6. See also, Pure Magnesium from the People's Republic of China: Preliminary Results of 2007-2008 Antidumping Duty Administrative Review, 74 FR 27090 (June 8, 2009).

<sup>139</sup> See OCTG from China at Comment 27.

for research and development, recreational uses, or portable oxygen for aircrafts and nitrogen for aircraft or kitchen hood detection; (2) it purchased oxygen and nitrogen that was generated at its factory by a third-party supplier and transmitted via pipeline whereas all of the oxygen and nitrogen imported into India is contained in cylinders of compressed gas or liquid; and (3) the WTA values for oxygen and nitrogen are absurd when compared to a number of prices on the record including the price TPCO paid for oxygen and nitrogen, University of Florida pricing series, prices for providing oxygen and nitrogen through a pipeline to TPCO's new mill which produces oil country tubular goods in the United States, and prices from Bombay Oxygen Corp. Ltd. ("Bombay Oxygen").

- TPCO urges the Department to value oxygen and nitrogen using sales values from Bombay Oxygen's public financial statements. TPCO states that Bombay Oxygen produces the same industrial oxygen and other gases offered by TPCO's supplier as 85% of Bombay Oxygen's sales are of oxygen, nitrogen, and argon, and its prices represent sales throughout India since it has plants in various regions of the country. Although the Department has previously rejected using Bombay Oxygen's prices as a SV because it was not profitable in its most recent fiscal year, TPCO claims its lack of a profit is most likely because of its cost structure and not evidence that it is not charging market prices for its oxygen and nitrogen.
- Petitioners argue that Bombay Oxygen's financial statements should not be used to value oxygen and nitrogen because the company sold industrial gases at a loss during fiscal year 2008-2009 and the Department's practice is to reject SVs based on financial statements that do not show a profit<sup>140</sup> Bombay Oxygen's financial statements were rejected as a source for oxygen and nitrogen prices in OCTG from China.<sup>141</sup>
- According to Petitioners, prices from Bhoruka Gases Ltd. should be used to value oxygen and nitrogen because: (1) these prices are specific to industrial oxygen and nitrogen whereas record evidence shows that Bombay Oxygen's prices are based on oxygen sold for medicinal uses and specialized nitrogen gases; (2) TPCO has not supported its argument that inflating the prices from Bhoruka Gases Ltd. results in distorted oxygen and nitrogen prices, and; (3) the prices that TPCO has placed on the record that may call into question Bhoruka Gases Ltd.'s prices are inappropriate benchmarks for determining the reasonableness of potential SVs since they are either U.S. prices (University of Florida pricing series and prices from TPCO's U.S. OCTG mill), NME prices (the price TPCO paid for oxygen and nitrogen in China) or prices from Bombay Oxygen which do not reflect appropriate market prices.<sup>142</sup>

### Department's Position:

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<sup>140</sup> See Lightweight Thermal Paper From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 57329 (Oct. 2, 2008), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>141</sup> See OCTG from China at Comment 28.

<sup>142</sup> See TRBs from China; OCTG from China at Comment 28.

As noted above, the Department's practice when selecting SV information, in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, SVs which are product-specific, representative of a broad market average, publicly available, tax exclusive, and contemporaneous with the POI. While there is no hierarchy for applying the SV selection criteria, "the Department must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the "best" SV is for each input."<sup>143</sup>

For the final determination, the Department examined the information on the record to identify the best available information to derive SVs for nitrogen and oxygen. As a starting point, we agree with Petitioners that TPCO's proposed benchmarking data are inappropriate for benchmarking purposes. Specifically, with regard to TPCO's purchase invoices, we find that these invoices are inappropriate as they reflect internal transactions conducted in an NME country.<sup>144</sup> The Department has a clear and established practice of not relying on NME transaction prices because they do not represent prices that are driven by market factors.<sup>145</sup> Accordingly, we have not considered TPCO's NME prices in this analysis. Additionally, Department precedent also holds that values from countries at levels of economic development different from the PRC are not suitable comparative price benchmarks to test the validity of selected SVs.<sup>146</sup> Thus, the prices from the United States are also not suitable for benchmarking in this proceeding.

Finally, TPCO also submitted pricing information from Bombay Oxygen, an Indian supplier of industrial gases, and suggested these data as an alternative SV source. However, the Department does not find this information, or TPCO's arguments regarding these data, compelling for the reasons outlined below. After a careful review of the Bombay Oxygen financial statements, we agree with Petitioners that there is evidence that the industrial gases division operated at a loss during the 2008-2009 fiscal year; indicating that the prices for nitrogen and oxygen, as reported in this financial statement, may not reflect appropriate market-based prices in India. TPCO has provided no evidence to support its contention that the unprofitability of Bombay Oxygen's industrial gas division was caused by factors other than not charging market prices for oxygen and nitrogen. Accordingly, we determine that this is not the best available information on the record of this proceeding with which to value nitrogen and oxygen.

The Department also recognizes that the WTA Indian data for nitrogen and oxygen are not specific to TPCO's inputs. In valuing nitrogen and oxygen in other AD cases, we selected Indian

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<sup>143</sup> See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China, 73 FR 55039 (September 24, 2008) at Comment 2; see Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People's Republic of China, 69 FR 67304 (November 17, 2004) at Comment 3; see also Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China: Final Results of the 2007-2008 Administrative Review of the Antidumping Duty Order, 75 FR 8301 (February 24, 2010).

<sup>144</sup> See Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review, 71 FR 66304 (November 14, 2006); OCTG from China at Comment 2.

<sup>145</sup> See OCTG from China at Comment 2.

<sup>146</sup> See section 773(c)(4) of the Act. See also Saccharin from the People's Republic of China: Final Results of the 2005-2006 Antidumping Duty Administrative Review, 72 FR 51800 (Sept. 11, 2007).

financial statements in favor of WTA data because we found that WTA data do not distinguish industrial nitrogen and oxygen from other, higher grades of nitrogen and oxygen.<sup>147</sup> In this case, the record shows that TPCO uses industrial grade nitrogen and oxygen. We have examined the remaining potential SV data source on the record, which is publicly available information from Bhoruka Gases Ltd, to ascertain whether it meets the Department's SV criteria. Because Bhoruka Gases Ltd. manufactures not only oxygen, but also nitrogen and other industrial gasses, and we have used these data in other AD proceedings, we have determined that it is a reliable SV source for valuing oxygen and nitrogen.<sup>148</sup> While we note that the Bhoruka Gases Ltd. data are not contemporaneous with the POI, we find: (1) no indication that the data are faulty; (2) they are from the primary surrogate country; and (3) they provide a wide set of data points distinguishing oxygen prices depending on the type of oxygen (e.g., high grade pure oxygen versus commercial or industrial gas oxygen) and nitrogen prices based on grade. Significantly, we find that this data source is very specific to the input we are valuing and does not exhibit some of the defects identified for other SV sources on the record for these inputs. Furthermore, while the data are not contemporaneous with the POI, the specificity of these data, along with the fact that they represent values from the primary surrogate country, makes them the best available information on the record of this proceeding for valuing oxygen and nitrogen. TPCO has provided no evidence to support its contention that the technology to produce oxygen and nitrogen has changed such that these prices have not kept pace with inflation. Further, TPCO's arguments that there are no costs for the key input, air, used in producing oxygen and nitrogen and minimal labor costs involved in producing oxygen and nitrogen do not prove that suppliers have not increased prices based on other market factors that may be affected by the overall inflation rate. TPCO's argument that depreciation costs are unaffected by inflation ignores the fact that companies periodically may revalue their assets to account for inflation. Therefore, in the final determination, we will inflate the Bhoruka Gases Ltd. prices to be contemporaneous with the POI and use these prices to value oxygen and nitrogen.

#### **Comment 11: The Appropriate Surrogate Value for Medium Carbon Ferrochromium**

- In the Preliminary Determination the Department valued TPCO's medium carbon ferrochromium (MIDCHROM) input using HTS subheading 7202.49 (Ferro-Chromium - Other). TPCO argues that its MIDCHROM should be valued using imports under the Indian HTS subheading 7202.41 "containing more than 4% carbon by weight" rather than the Indian HTS subheading 7202.49 (Ferro-Chromium - Other) that was used in the Preliminary Determination "based on the chromium content of TPCO's consumed inputs."<sup>149</sup>
- Petitioners assert that TPCO provided no support for its argument nor did the Department find at verification that TPCO's MIDCHROM had been improperly valued; thus the Department should continue to value MIDCHROM using the Indian HTS 7202.49 (Ferro-Chromium - Other).

<sup>147</sup> See, e.g., Diamond Sawblades and Parts Thereof from the People's Republic of China, Final Determination in the Antidumping Duty Investigation, 71 FR 29303 (May 22, 2006); OCTG from China at Comment 2.

<sup>148</sup> See Id.

<sup>149</sup> See TPCO's brief at 24.

## Department's Position:

We agree with Petitioners and have continued to value TPCO's MIDCHROM inputs using WTA data under HTS subheading 7202.49, because these data constitute the best available information on the record for valuing TPCO's MIDCHROM inputs.<sup>150</sup> We have determined that this HTS category is a more appropriate surrogate to value TPCO's MIDCHROM inputs because it is specific to TPCO's inputs.<sup>151</sup> TPCO has not provided support for its argument that Indian HTS subheading 7202.41 "containing more than 4% carbon by weight" represents the MIDCHROM inputs used by TPCO. Therefore, the Department will continue to use HTS subheading 7202.49 to value TPCO's MIDCHROM, which represents ferrochromium with a lower carbon content.

## Comment 12: The Appropriate Surrogate Value for Calcium Silicide

- Petitioners argue that the Department, in its Preliminary Determination, valued Hengyang's silicide calcium (SiCa cable) using Indian WTA data from HTS subheading 2850.00.41 (Hydrides, Nitrides, Azides, Silicides & Borides W/N Chemically Defined, O/T Compounds... Calcium Silicide), while the Department valued TPCO's calcium silicide (to value SICAWIRE) using WTA data from HTS subheading 2850.00.49 (Hydrides, Nitrides, Azides, Silicides & Borides W/N Chemically Defined, O/T Compounds... Other Silicides Except Calcium). Petitioners argue that silicides made of calcium are specifically used in the steel production process to produce alloy steel. Therefore, Petitioners argue that, for the final determination, the Department should use the same HTS code used for Hengyang (HTS code 2850.00.41) to value TPCO's reported input (SICAWIRE) because the subheading covers imports of calcium silicide and is, therefore, more specific than the basket category used (HTS code 2850.00.49).
- TPCO did not rebut Petitioners' arguments.
- Hengyang contends that the SV for SiCa cable that the Department used in the Preliminary Determination, based on HTS code 2850.00.41, is incorrect and aberrational and, instead, for the final determination, the Department should use HTS code 7202.99.90. For Hengyang's aberrational argument, it benchmarked the Indian WTA import data against the U.S., Philippines, and Indonesian import data for HTS code 2850.00.41. Hengyang argues that the description for HTS code 7202.99.90 matches the input it uses to produce subject merchandise. Alternatively, Hengyang contends that HTS code 2850.00.49 is more appropriate than HTS code 2850.00.41.
- In rebuttal to Hengyang, Petitioners contend that HTS code 2850.00.41 is more appropriate than either HTS code proposed by Hengyang since it applies to silicides of calcium for use in making alloy steel, and Hengyang has submitted supporting documentation which indicates that this is the precise input which it uses to produce subject merchandise. Therefore, Petitioners state that the Department may not select a

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<sup>150</sup> See section 773(c)(4) of the Act.

<sup>151</sup> See TPCO's Supplemental Questionnaire Response, dated March 16, 2010, at Exhibit S2-9.

less precise SV by selecting data for another HTS classification. Further, the Petitioners argue that Hengyang's analysis indicating that the Department's selected SV is aberrational should be rejected since it compares the SV to less-specific six-digit tariff codes.

### **Department's Position:**

The Department agrees with Petitioners and has used the Indian import data from WTA for HTS 2850.00.41 to value both TPCO's SICAWIRE and Hengyang's SiCa cable, as it is the best available information on the record for this purpose. In valuing the FOP, section 773(c)(1) of the Act instructs the Department to use the "best available information" from the appropriate market-economy country. The Department considers several factors when choosing the best available information, including the quality, specificity and contemporaneity of the data.<sup>152</sup> Moreover, it is the Department's practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing FOP on a case-by-case basis.<sup>153</sup> There is no hierarchy for applying the above-mentioned criteria and the Department must weigh available information with respect to each input and make a product-specific and case-specific decision as to what the "best" SV is for each input. The Department has stated in numerous NME cases that it favors the use of a more specific SV, when available, over a SV based on a basket HTS category.<sup>154</sup> In the instant investigation, the Department finds that the more specific, publicly available, and reliable value for calcium silicide is derived from the WTA data for HTS subheading 2850.00.41.

With regard to TPCO's SICAWIRE, the Department agrees with Petitioners that in the Preliminary Determination, the most specific HTS data was not used. The Department has found that tariff codes that are designated as "other" are "by definition less determinate."<sup>155</sup> The subheading 2850.00.49 is an "other" category in that it is defined as "Hydrides, Nitrides, Azides, Silicides & Borides W/N Chemically Defined, O/T Compounds...Other Silicides Except Calcium." Subheading 2850.00.41 is more specific to calcium silicide (Hydrides, Nitrides, Azides, Silicides & Borides W/N Chemically Defined, O/T Compounds ... Calcium Silicide.) Therefore, the Department has determined that subheading 2850.00.41 is more specific and constitutes the best available information for this review.

With regard to Hengyang, the Department agrees with Petitioners that HTS code 2850.00.41

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<sup>152</sup> See Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China, 71 FR 53079 (September 8, 2006) ("Certain Lined Paper Products from China") and accompanying Issues and Decision Memorandum at Comment 3.

<sup>153</sup> See Certain Tissue Paper Products from the People's Republic of China: Final Results and Partial Rescission of the 2007-08 Antidumping Duty Administrative Review and Determination Not to Revoke in Part, 74 FR 52176 (October 9, 2009) ("Tissue Paper Products from China") and accompanying Issues and Decision Memorandum at Comment 3.

<sup>154</sup> See Certain Preserved Mushrooms from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 FR 44827 (August 9, 2007) and accompanying Issues and Decision Memorandum at Comment 2; Tissue Paper Products from China.

<sup>155</sup> See Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review, 73 FR 49162 (August 20, 2008) and accompanying Issues and Decision Memorandum at Comment 1.

principally matches the input used by Hengyang and that this is a more specific SV. Regarding the two alternative values proposed by Hengyang, we find that neither one is preferable to the WTA data for HTS subheading 2850.00.41. The subheading 2850.00.49 is overly broad and “by definition less determinate” as described above. The subheading 7202.99.90 (Ferroalloys: Other) is also not the best available information. Hengyang’s SiCa cable does not meet the definition of ferroalloys under Indian tariff code. Although Hengyang argues that the Department’s data are aberrational, Hengyang has failed to identify any specific evidence showing the data are distorted or unrepresentative of the calcium silicide it purchased and used.<sup>156</sup> Hengyang pointed to a less specific six-digit tariff code for benchmarking purposes and, consistent with Department practice, the Department has determined that this tariff code is not suitable and cannot be used to show aberration.<sup>157</sup>

Therefore, for the final determination, we are applying the data under HTS code 2850.00.41 to both TPCO’s SICAWIRE input and Hengyang’s SiCa cable input as these data relate directly to calcium silicide.

### **Comment 13: The Appropriate Surrogate Value for Dolomite and Dolomite Powder**

- Hengyang contends that the SV for dolomite and dolomite powder that the Department used in the Preliminary Determination, which was based on HTS code 2518.10.00, is not applicable to dolomite used to produce steel. Also, Hengyang claims that the Department has previously found that the data for HTS code 2518.10.00,<sup>158</sup> although the most appropriate HTS code, was aberrational. Instead, Hengyang argues that the Department should value dolomite using a SV of Rs. 1,366.83 per MT, which is derived from several 2006-07 financial statements.
- The Petitioners contend that, where the Department has previously found that data for HTS code 2518.10.00 are aberrational, the respondent had placed information on the record demonstrating that its dolomite input was of a lower quality than that which is internationally traded. The Petitioners state that Hengyang has not submitted such information in this investigation.

### **Department’s Position:**

For the final determination, the Department has treated dolomite and dolomite powder as overhead items rather than direct FOP. Therefore, the Department has not valued these FOP. See Comment 38, “Treating Certain Auxiliary Materials as Inputs”, for a detailed explanation.

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<sup>156</sup> See TRBs from China 2009 at Comment 6.

<sup>157</sup> See TRBs from China 2010 at Comment 3.

<sup>158</sup> Hengyang’s case brief lists 2850.00.41, an HTS code for calcium silicide, as the HTS code for dolomite. The Department is treating this as a typographical error and is responding to the argument on HTS code 2518.10.00, which is used for dolomite.

#### Comment 14: The Appropriate Surrogate Value for Compressed Air

- Petitioners maintain that in the Preliminary Determination, the Department stated that it did not value compressed air because the electricity used to produce compressed air was, according to TPCO, included in the electricity consumption reported in the FOP database. However, Petitioners note that TPCO reported that it used both self-produced and purchased compressed air in the production of the subject merchandise during the POI. Accordingly, Petitioners argue that the Department should calculate a separate SV for the compressed air that was purchased by TPCO.
- Moreover, Petitioners argue that the Department should value compressed air that TPCO purchased differently from the compressed air that TPCO self-produced (*i.e.*, not value purchased compressed air based only on electricity, as if the air had been self-produced). Petitioners maintain that in OCTG from China, the Department rejected TPCO's argument that it should value the company's purchases of compressed air in the same manner that it values TPCO's self-produced compressed air.<sup>159</sup> Furthermore, Petitioners also note that the Department rejected TPCO's argument in OCTG from China that because more than 33 percent of compressed air was self-produced, the Department should value all compressed air based on electricity consumption used to produce compressed air. Therefore, Petitioners contend that the Department should not value all compressed air based on electricity consumption used to produce compressed air.<sup>160</sup>
- Petitioners maintain that, notwithstanding its rejection of TPCO's argument on this issue in OCTG from China, the Department proceeded to value all compressed air based on the value of electricity required to produce the amount of compressed air consumed.<sup>161</sup> Petitioners argue that the Department's method of valuing purchased compressed air based on the value of electricity failed to account for, *inter alia*, SG&A expenses and profit realized by the supplier that sold the compressed air to TPCO, which distorts the Department's NV calculation. According to Petitioners, in order to avoid this distortion in the instant investigation, the Department should use WTA data to calculate a SV for TPCO's purchased compressed air.<sup>162</sup>
- Alternatively, Petitioners argue that if the Department decides not to use WTA data to value compressed air, it should use, as the best information available, the value for oxygen from Bhoruka Gas,<sup>163</sup> used by the Department in its Preliminary Determination to value oxygen, to value compressed air. According to Petitioners, such valuation would be appropriate since both oxygen and compressed air are produced in the same manner, and the information provided on the record of this investigation by both TPCO and Hengyang demonstrates that the production of self-produced oxygen and compressed air requires electricity. Petitioners note that the Department found that data from Bhoruka

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<sup>159</sup> See OCTG from China at Comment 22.

<sup>160</sup> Id.

<sup>161</sup> Id.

<sup>162</sup> See Petitioners' Surrogate Value Submission at Exhibit I (Public Document).

<sup>163</sup> See Surrogate Value Memorandum at 5 (Public Document).



Gas do not have the same flaws as either Indian import data or the financial statements of Indian gas producers considered for valuing industrial gases.<sup>164</sup> Thus, Petitioners argue that data from Bhoruka Gas should be used by the Department to value TPCO's purchases of compressed air.

- TPCO refutes Petitioners' argument that the Department should use the SV for oxygen or WTA data to value compressed air, and argues that the Department should continue its past practice of valuing all of TPCO's consumption of compressed air based on electricity, which is the sole input into producing compressed air. TPCO argues that the WTA data are aberrational and would make compressed air account for an unreasonably high percentage of TPCO's cost of sales of all products during the POI. TPCO argues that the data placed on the record of this investigation shows that it consumes industrial-grade gaseous compressed air which is transportable by pipeline, whereas, the WTA data for compressed air is comprised of both liquefied compressed air for car air conditioning, and air with 10% sodium content, both of which are imported in small bottles.<sup>165</sup>
- TPCO also argues that valuing compressed air with an oxygen value would be inaccurate and contrary to the Department's obligations to calculate accurate margins and select the best information available because the values for industrial grade oxygen from Bombay Oxygen and Bhoruka Gas have a high oxygen purity level, which involves the removal of nearly all impurities and other gases present in air. In contrast, TPCO claims that its compressed air's key specification is pressure, not purity. TPCO further notes that the value on the record for oxygen is substantially higher than that of any of the pressured air prices on the record which TPCO considers to be non-aberrational.
- TPCO argues that there are no valid SVs for the type of compressed air it consumed in the production of the subject merchandise, and that the most accurate means by which compressed air can be valued is to use TPCO's consumption of electricity. TPCO maintains that the Department came to this conclusion in OCTG from China.<sup>166</sup> TPCO states that, contrary to Petitioners' assertion, its argument that purchases of compressed air should be valued in the same manner as self-produced air was not rejected by the Department in the OCTG from China. TPCO argues that the Department found the WTA data to be "... not as representative of TPCO's production cost for compressed air as is the cost of electricity used to produce the air that is delivered by pipeline."<sup>167</sup>
- TPCO argues that the Department should continue to value compressed air based on the amount of electricity consumed to produce a cubic meter of compressed air. TPCO states that the information placed on the record provides for such an electricity amount and that the Department should use that amount in calculating the value for compressed air for purposes of the final determination in this investigation.

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<sup>164</sup> See Issues and Decision Memorandum in OCTG from China at Comment 28.

<sup>165</sup> See TPCO's Final Surrogate Value Submission at Exhibit 30.

<sup>166</sup> See OCTG from China and Issues and Decision Memorandum at Comment 22.

<sup>167</sup> Id.

## Department's Position:

While we agree with Petitioners that purchased compressed air must be valued, we disagree with Petitioners' proposals for valuing purchased compressed air. Although the Department did not value purchased compressed air in its Preliminary Determination, since the Preliminary Determination, the Department verified TPCO's responses and confirmed that TPCO both produced and purchased compressed air. As indicated in the verification report, the Department verified revisions involving purchased compressed air, as well as the quantity of electricity that TPCO consumed to produce compressed air.<sup>168</sup> Therefore, for purposes of the final determination, the Department has included the value of purchased compressed air in TPCO's NV calculation. See TPCO's Analysis Memorandum for the Final Determination, issued concurrently with this memorandum. However, as explained below, we have not valued purchased compressed air using the values proposed by Petitioners.

As for valuing purchased compressed air, the Department has determined that the best available information for valuing all of TPCO's consumption of compressed air is the value of electricity required to produce the amount of compressed air consumed in the production of subject merchandise. See section 773(c) of the Act (stating that Commerce shall determine NV based on the FOP using the best available information). This is consistent with OCTG from China, in which the Department determined that the best available information for valuing all of TPCO's consumption of compressed air, including purchased compressed air, was a SV for electricity.<sup>169</sup> The Department finds that the value of electricity represents the best available information because electricity is the main input required to produce compressed air; and in this case, the consumption quantity of electricity required to produce one unit of compressed air is on the record of this investigation.<sup>170</sup>

The Department has not used WTA data to value compressed air because the WTA data for air does not typically cover imports of air conveyed by pipeline, which is how TPCO's air is transported.<sup>171</sup> Therefore, the Department finds that the WTA data is not as representative of TPCO's cost for compressed air as is the cost of electricity used to produce the air that is delivered by pipeline. Moreover, we disagree with Petitioners' suggestion that using the value of oxygen would be appropriate for valuing the type of compressed air used by TPCO. Given the process by which oxygen is produced, the technical specifications and value of oxygen, the Department finds the value of oxygen not to be representative of the type of compressed air used by TPCO in the production of the subject merchandise. Given the fact that the WTA data for compressed air are not representative of the type of industrial compressed air consumed by TPCO in the production of the subject merchandise, and the fact that the value of oxygen is not equivalent to, or representative of, the value of compressed air used by TPCO, the Department has disregarded the WTA data and, as best information available, valued compressed air based on TPCO's cost of electricity used to produce compressed air. Specifically, the Department used a SV for the quantity of electricity consumed in producing one cubic meter of compressed air.

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<sup>168</sup> See TPCO's PRC Verification Report, dated July 1, 2010, at pages 3 and 17.

<sup>169</sup> See OCTG from China at Comment 22.

<sup>170</sup> See Exhibit 1, Attachment 6, of the Department's PRC Verification Report of TPCO's Responses.

<sup>171</sup> See TPCO's Section D submission, dated March 16, 2010, at Exhibit 11.

See TPCO's Final Analysis Memorandum. Moreover, contrary to Petitioners' argument that the electricity value does not account for the amounts of SG&A and profit reflected in the price charged by the supplier of this input, the Department notes that similar costs are already included in the financial ratios applied to TPCO's cost of manufacturing.

#### **Comment 15: The Appropriate Surrogate Value for Steam Coal**

- Petitioners argue that the Department should use WTA Indian import data to value TPCO's steam coal used in the production of subject merchandise. Petitioners maintain that the Department should not continue to use The Energy and Resources Institute ("TERI") data, as it did in the Preliminary Determination.
- Petitioners argue that, in the Preliminary Determination, the Department valued steam coal using TERI data because the Department reasoned that TERI data were more specific to the type of coal used by TPCO, and because the Department used TERI data in the investigation of OCTG from China to calculate the unit factor cost for TPCO's steam coal.<sup>172</sup> However, Petitioners contend that there is additional information on the record of this investigation, which was not on the record in OCTG from China, which indicates that the TERI data are not representative of the type of steam coal used by TPCO. Petitioners argue that the Indian import data are more specific than the TERI data in that they represent steam coal with low ash content properties, similar to those of the steam coal used by TPCO, whereas, the TERI data represent steam coal with ash content higher than that used by TPCO. In support of their argument, Petitioners cite to the Report of the Standing Committee for Energy, Chapter VI a 6.1, indicating that the "quality of Indian {domestic} coal is poor" due to its high ash content.<sup>173</sup> Petitioners assert that the average ash content of Indian domestic coal is between 34 percent and 50 percent.<sup>174</sup> Petitioners further argue that Indian imports of coal are of a substantially higher quality than Indian domestic coal in that Indian coal imports have an average heat content of around 6,000 kilocalories per kilogram ("Kcal/kg") and, in stark contrast to domestic Indian coal, have an average ash content of around 8 percent.<sup>175</sup>
- Accordingly, Petitioners argue that, unlike the price of coal in other countries, including China, the high ash content in the domestically produced Indian coal lowers its value for a number of reasons, such as the costs of fly ash disposal,<sup>176</sup> increased transportation costs due to the bulk of the ash,<sup>177</sup> decreased efficiency in energy generation for steam

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<sup>172</sup> Id.

<sup>173</sup> See Report of the Standing Committee for Energy, Chapter VI at 6.1 (attached as Ex. R to Petitioners' Final Surrogate Value Submission (June 7, 2010) ("Petitioners' Final Surrogate Value Submission") (Public Document)).

<sup>174</sup> Id. at 6.17; Pew Center, "Coal Initiative Reports" at 15 (attached as Ex. U to Petitioners' Final Surrogate Value Submission (Public Document)).

<sup>175</sup> See Report of the Standing Committee for Energy, Chapter VI, at 6.4, 6.16; Platts, "International Coal Report" at 8 (attached as Ex. T to Petitioners' Final Surrogate Value Submission (Public Document)).

<sup>176</sup> See Report of the Standing Committee for Energy, Chapter VI at 6.7.

<sup>177</sup> See World Energy Council, "Coal in India" at 6.1 (attached as Ex. S to Petitioners' Final Surrogate Value Submission (Public Document)).

coal,<sup>178</sup> and the corrosion of boiler walls and other related damage when the coal is burned to produce steam.

- Additionally, Petitioners maintain that TPCO has provided lab reports setting forth the heat and ash contents of its steam coal.<sup>179</sup> According to Petitioners, these lab reports show that the heat and ash contents of TPCO's steam coal are similar to the heat and ash contents of coal imports into India, rather than those of the Indian domestic coal.<sup>180</sup>
- Moreover, Petitioners assert that, while the TERI data report the heat content for the coal that such data cover, they do not report the ash content.<sup>181</sup> Accordingly, Petitioners argue that since the TERI data are solely for domestic coal, it is clear that the TERI data provide prices representing steam coal with an abnormally high ash content.
- Furthermore, Petitioners point to the fact that in OCTG from China the Department noted its concern regarding the "monopolistic structure of the coal industry in India" and, in turn, the use of a domestic Indian price as a source of SV data.<sup>182</sup> Therefore, Petitioners conclude that the data for imports of coal into India, in contrast to the TERI data for domestically produced Indian coal, are not affected by any such monopolistic structure.
- Finally, Petitioners argue that if the Department decides to use the TERI data in the final determination, it should add freight to convert such data to a delivered value, since the TERI data do not reflect a delivered value.<sup>183</sup> Moreover, Petitioners argue that because the TERI data do not represent import prices, the Sigma cap<sup>184</sup> on freight expenses for SVs does not apply. Accordingly, under such a circumstance, Petitioners argue that the Department should add freight based on the actual distance between the source of coal and TPCO's production facilities.
- TPCO argues that the Department should reject Petitioners' argument, asserting that the Department had addressed such comments in prior cases and found such argument to be insufficient.<sup>185</sup> TPCO contends that, in the Preliminary Determination, consistent with its past practice, the Department determined that the TERI data is more specific than the WTA basket category data for steam coal under HTS 270.119.20.<sup>186</sup> TPCO further argues

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<sup>178</sup> Id. at 7.1.

<sup>179</sup> See TPCO's Preliminary Surrogate Value Comments and Rebuttal Comments (Feb. 12, 2010) ("TPCO's Preliminary Surrogate Value Comments") at Ex. 3 (Public Version).

<sup>180</sup> Id. (BPI Version).

<sup>181</sup> Id. at Ex. 5, P. 57 (classifying steam coal on an A through G scale based solely on heat content).

<sup>182</sup> See Issues and Decision Memorandum in OCTG from China at Comment 21 (Unpublished Public Version).

<sup>183</sup> See TPCO's Preliminary Surrogate Value Comments at Ex. 5, p. 57 (Public Version).

<sup>184</sup> See *Wuhan Bee Healthy Co., Ltd. v. United States*, Slip Op. 05-65 (CIT June 10, 2005).

<sup>185</sup> See First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 74 FR 57995 (November 10, 2009), and accompanying Issues and Decision Memorandum at Comment 3c and 3g; OCTG from China at Comment 21.

<sup>186</sup> See Memorandum to the File: Antidumping Duty Investigation of Seamless Carbon and Alloy Steel Standard Line and Pressure Pipe from the People's Republic of China: Surrogate Value Memorandum for the Preliminary Determination ("Prelim SV Memo") at 6-7; see also Carbon 1<sup>st</sup> AR at Comment 3c and 3g.

that, contrary to Petitioners' assertions, the TERI data is specific to the type of grade of coal used by TPCO in its production of the subject merchandise, as TERI data list prices for specific useful heat value ("UHV") representing the UHV of TPCO's steam coal, which TPCO placed on the record of this investigation.<sup>187</sup> TPCO argues that the WTA data does not include UHV and so it is not possible to determine whether the WTA data are representative of the steam coal used by TPCO. TPCO maintains that there is no evidence on the record that the specific coal type quoted by TERI data with the UHV equivalent to that of TPCO's steam coal has ash content different from the ash content of TPCO's steam coal. TPCO further claims that the ash content is not reflected in the TERI data because the UHV fully explains the quality of steam coal for generating heat and steam, the purpose for which steam coal is intended, and so the TERI data are most specific, nor have Petitioners presented data to indicate that WTA data are more specific.<sup>188</sup>

- Accordingly, TPCO argues that the Department should continue to use TERI data for steam coal in the final determination, asserting that the Department has consistently used TERI data to value steam coal, and to deviate here would be inconsistent with the Department's obligations under section 773(c)(1) of the Act to select the best available information to value the FOP.

### **Department's Position:**

As in OCTG from China, the Department continues to value TPCO's reported FOP for steam coal using the TERI data for Grade A non-coking coal. When selecting SVs, the statute directs the Department to select the best available information. See section 773(c)(1) of the Act. The Department normally determines SVs based upon publicly available information, and the Department considers the quality, specificity, and contemporaneity of the data.<sup>189</sup> The Department carefully considers the available evidence with respect to the particular facts of each case and evaluates the suitability of each SV source on a case-by-case basis.<sup>190</sup> As there is no hierarchy for applying the above-mentioned principles (e.g., quality, specificity, and contemporaneity), the Department must weigh available information with respect to each input and make a product and case-specific decision as to what constitutes the "best" available SV for each input.<sup>191</sup> In the Preliminary Determination, the Department used TERI data instead of the WTA Indian import data to calculate the value for the steam coal used by TPCO,<sup>192</sup> because "...

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<sup>187</sup> See TPCO's Preliminary Surrogate Value Submission at Exhibits SV-3, SV-4.

<sup>188</sup> See e.g., Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 73 FR 52,645 (Department of Commerce September 10, 2008), and accompanying Issues and Decision Memorandum at Comment 4.

<sup>189</sup> See Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079 (September 8, 2006) ("CLPP"), and accompanying Issues and Decision Memorandum at Comment 3.

<sup>190</sup> See Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review, 71 FR 40477 (July 17, 2006) ("Mushrooms"), and accompanying Issues and Decision Memorandum at Comment 1.

<sup>191</sup> See Mushrooms at Comment 1.

<sup>192</sup> See Prelim SV Memo, at 6 (Public Document).

the Terry {sic} data provides more specific Indian values for the type of steam coal used by TPCO, and consistent with the Department's practice in prior cases, we have preliminarily used the Terry {sic} data as a basis for valuing steam coal." Id.  
In OCTG from China, the Department used the TERI data to value TPCO's steam coal, stating that:

{t}he use of TERI data over import statistics is evaluated on a case-by-case basis and has been upheld by the CIT. *See Wuhan Bee Healthy Co., Ltd. v. United States*, Slip Op. 05-142 at 5-6 (November 2, 2005). Although, in the past, the Department has noted some concerns about the monopolistic structure of the coal industry in India,<sup>193</sup> for this investigation, the Department determines that the TERI Grade A non-coking coal pricing data are the best available information on the record because not only are they published, publicly available data, but they are also representative of the coal industry throughout India.<sup>194</sup> TERI data are categorized by major types of coal and the UHV value, whereas WTA import data are listed under "steam coal" irrespective of UHV.<sup>195</sup> Since TPCO reported the UHV value of the coal it consumed to produce subject merchandise, as evidenced by lab reports on the record of this proceeding, the Department is able to derive a SV more specific to the actual coal consumed by TPCO using the TERI data. Furthermore, we agree with TPCO that Petitioners have not provided specific evidence on the record that demonstrates swings in coal prices render the TERI data unreliable.<sup>196</sup>

As in OCTG from China, the Department continues to find the TERI Grade A non-coking coal pricing data to be the best available information on the record of this instant investigation because: (1) the data reflect published, publicly available information; (2) they are representative of the coal industry throughout India;<sup>197</sup> (3) they are categorized by major types of coal and the UHV value;<sup>198</sup> and (4) the data are contemporaneous with the POI. Moreover, in this instant investigation, TPCO also reported the UHV value of the coal it consumed in the production of the subject merchandise, thereby allowing the Department to derive a more specific SV to the type of coal consumed by TPCO, using the TERI data, than the value reflected in the WTA Indian import data.

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<sup>193</sup> See Final Results of Redetermination Pursuant to Remand; Wuhan Bee Healthy Co., Ltd. v United States, Consol. Court No. 03-00806, Slip Op. 05-65 (June 10, 2005), available at <<http://ia.ita.doc.gov/remands/05.pdf>>.

<sup>194</sup> See Saccharin/PRC 9/11/07 IDM at Comment 3.

<sup>195</sup> See Certain Cased Pencils from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 33406 (July 13, 2009).

<sup>196</sup> See OCTG from China, Issues & Decision Memo, at Comment 22.

<sup>197</sup> See Saccharin from the People's Republic of China: Final Results of the 2005-2006 Antidumping Duty Administrative Review, 72 FR 51800 (September 11, 2007) and accompanying Issues and Decision Memorandum at Comment 3.

<sup>198</sup> See Certain Cased Pencils from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 33406 (July 13, 2009)

Furthermore, we agree with TPCO that Petitioners' evidence regarding the TERI data has not called into question its appropriateness as a SV. While Petitioners have cited to the Report of the Standing Committee for Energy in support of their argument that the type of steam coal reflected in the WTA data is more similar to that used by TPCO and is of a higher value than the type of steam coal reflected in the TERI data, the Department determines that the TERI data includes steam coal of the equivalent UHV as that used by TPCO in its production of subject merchandise, and that the TERI data is specific to such an input. Moreover, Petitioners provided no specific evidence in support of their claim that the ash content of the type of coal reflected in the TERI data indicates that it is unrepresentative of the coal used by TPCO. In addition, the WTA data which Petitioners recommend do not constitute the best available information because they are less specific to the input being valued. We are unable to determine the UHV of the steam coal under this basket category, whereas the TERI data indicate the UHV, which is the equivalent of TPCO's steam coal's UHV. Therefore, we find that the TERI data continues to be the best available information for valuing steam coal because it is publicly available, contemporaneous, and specific to the input to be valued. This is consistent with our determination in OCTG from China and our use of TERI data in past cases in which it met our criteria for best available information. Therefore, the Department has continued to use the TERI data as the source for valuing TPCO's factor for steam coal in the final determination.

### III. TPCO-Specific Issues:

#### Comment 16: Whether to Apply AFA Because of Errors in the FOP Database

- Petitioners argue that the Department should apply total AFA to TPCO because of the company's failure to report reliable FOP data. Specifically, Petitioners assert that the Department could not verify TPCO's reported quantities of purchased and self-produced steel billets, the primary input used in the production of the subject merchandise.
- Petitioners maintain that, when constructing its FOP database, TPCO had to account for both purchased and self-produced steel billets,<sup>199</sup> by using the quantities of purchased and self-produced steel billets to weight-average the usage rates of each and every input it used to produce steel billets. Thus, according to Petitioners, the quantities of purchased and self-produced steel billets determined the usage rates for the inputs used to self-produce steel billets. They further argue that, given TPCO's misreporting of the quantities of purchased and self-produced steel billets, the majority of inputs reported in the FOP database for self-produced steel billets are wrong because they have not been weighted properly.<sup>200</sup>

<sup>199</sup> See TPCO's Response to Section D of the Department's Questionnaire (Dec. 23, 2009) ("Section D Response") at 5 (Public Version).

<sup>200</sup> These inputs are: ANCOAL, COALPOWDER, COKE, CWIRE, FECBALL, LUMPORE, NME\_IRONPOWDER, NUTCOKE, AL\_IRON, ALUMGRAN, ALWIRE, CATHODE, COKEPOWDER, DEOX, ELECNI, FECHRO, FEMN, FEMO, FERROTIT, FESI\_POWDER, HIGHCHROM, IRONSCALE, LOWMN, MIDCHROM, MIDMG, NIOIRON, R\_CARBONBALL, REDIRON\_PELLET, SI\_MANG, SICABAR, SICARBIDE, SICAWIRE, SIFERR, SILALCABA, TITWIRE, VANIORN, ARGON, CFURNACEGAS, RHFURNACEGAS, COALGAS, NATGAS, EMAG, TFERRO, MCCARBON, LCFERRO, SCSTEEL, PELLET, MINEPOWDER, COAL, ELECTRIC, NITROGEN, OXYGEN, WATER, DIRLAB, and INDLAB. Memorandum

- Accordingly, Petitioners maintain that the Department has no choice but to apply total facts available for TPCO in its final determination because the Department could not verify TPCO's FOP information.<sup>201</sup> Specifically, Petitioners argue that, according to the Act, the Department shall use facts available when information cannot be verified,<sup>202</sup> and Department should use an adverse inference<sup>203</sup> because TPCO did not cooperate to the best of its ability by not doing the maximum it was able to do.<sup>204</sup> Petitioners note that, despite the fact that TPCO was required to submit the same data just months ago in the investigation of OCTG from China and had months to prepare its submission in this instant investigation and prepare for verification, it failed to correct this significant error in its data. Petitioners contend that the Department's determinations in Certain Steel Threaded Rod from the People's Republic of China: Final Determination of Sales at Less than Fair Value ("Steel Rod from China") and Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part: Light-Walled Rectangular Pipe and Tube from the People's Republic of China ("Rectangular Pipe from China") are analogous to the instant case and warrant the application of total AFA here. They maintain that in Steel Rod from China, the Department applied total AFA because of the respondent's failure to properly report its FOP.<sup>205</sup> Specifically, Petitioners note that the respondent had allocated its FOP based on its total production quantity,<sup>206</sup> and because the Department could not verify the respondent's total production quantity, it could not verify the method by which the respondent constructed its FOP database. Accordingly, the Department rejected the respondent's FOP database.<sup>207</sup> According to Petitioners, as in Steel Rod from China, the Department cannot verify the foundation for TPCO's FOP database – i.e., the quantities of steel billets used in the production of the subject merchandise. Petitioners further state that in Rectangular Pipe from China, the Department rejected the respondent's FOP database because it could not verify the quantity of steel consumed in producing rectangular pipe.<sup>208</sup> Petitioners contend that, in this case, the Department could not verify the amount of steel billets that TPCO consumed in producing seamless pipe. Therefore, Petitioners argue that the Department should follow its precedents in both Steel Rod from China and Rectangular Pipe from China by rejecting TPCO's FOP database and applying total AFA to TPCO in the final determination.
- Alternatively, Petitioners argue that if the Department does not apply total AFA, it should

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to the File from Zev Primor and Magd Zalok re: Investigation of Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from People's Republic of China: Surrogate Values Memorandum for the Preliminary Determination (Apr. 21, 2010) ("Surrogate Values Memo") at Attachment 2 (Public Document).

<sup>201</sup> See section 776(a)(2) of the Act.

<sup>202</sup> Id.

<sup>203</sup> See section 776(b) of the Act.

<sup>204</sup> See NSK Ltd. v. United States, 481 F.3d 1355, 1361 (Fed. Cir. 2007) (quoting Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003)).

<sup>205</sup> See Steel Rod from China, 74 FR 8907 (Feb. 27, 2009) at Comment 5.

<sup>206</sup> Id.

<sup>207</sup> Id.

<sup>208</sup> See Rectangular Pipe from China, 73 FR 35652 (June 24, 2008) at Comment 1.



apply partial AFA when calculating the unit factor for purchased steel billets by using the highest usage rate for purchased steel billets reported by TPCO as the usage rate for this input for all CONNUMs, consistent with the Department's practice.<sup>209</sup> As an alternative, Petitioners argue that the Department could apply the petition rate as partial AFA.<sup>210</sup> The Petitioners contend that the Department should select whichever is higher to induce cooperation.<sup>211</sup>

- TPCO argues that Petitioners' allegation that the Department should apply total AFA because the Department could not verify TPCO's reported quantities of purchased and self-produced steel billet is wrong. First, TPCO claims that the Department verified TPCO's total consumption quantity of steel billets consumed and found no discrepancies in the overall consumption quantity of steel billet. TPCO further claims that it provided to the Department all of the information necessary to verify the ratio of purchased and self-produced steel billets. According to TPCO, the errors found in the calculation of the steel billet ratios for self-produced and purchased steel billet was limited to the smallest cost center, which accounts for a relatively small percentage of the total billets consumed across all billet-consuming cost centers, as shown in the verification exhibits collected by the Department during TPCO's verification.<sup>212</sup>
- TPCO further argues that the error in tabulation for the aforementioned cost center accounts for a small inaccuracy in the ratio between purchased and self-produced billet consumption. Moreover, TPCO contends that other information on the record corroborates the purchased to self-produced ratio that TPCO originally reported in its Section D response. In support of its contention, TPCO cites to page 72 of Verification Exhibit 13A of TPCO's verification report, showing the total quantity of purchased steel billet in relationship to the overall consumption quantity of steel billet.
- TPCO argues that it acted to the best of its ability by classifying the majority of purchased and self-produced steel billet correctly, but, due to human error, such classification was not followed properly for a single cost center. TPCO further argues that this error of tabulation were not the result of a systematic methodological error, which is reflected in the nature of the discovery of the error, and in the limitation of the error to a single cost center. Moreover, TPCO contends that when the aforementioned error was found, TPCO officials checked all such categorizations and confirmed that the errors were isolated in a single cost center, and that by the following day of verification, TPCO was able to offer a revised tabulation that reflected corrected totals, which the Department noted in its report.<sup>213</sup> Accordingly, TPCO asserts that in light of TPCO's efforts and the massive quantity of documentation collected by the Department at verification, it is clear from

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<sup>209</sup> See Certain Circular Welded Non-Alloy Steel Pipe From Mexico: Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part, 75 FR 20342 (April 19, 2010); Notice of Final Determination of Sales at Less Than Fair Value, and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India, 71 FR 45012, 45013 (Aug. 8, 2006).

<sup>210</sup> See section 776(b)(1) of the Act.

<sup>211</sup> SAA at 870; Ta Chen Stainless Steel Pipe, Inc. v. United States, 24 C.I.T. 841, 850 (2000).

<sup>212</sup> See Exhibit 13A of TPCO's Verification Report.

<sup>213</sup> See TPCO's Verification Report at 16.

record evidence that TPCO acted to the best of its ability in providing accurate information.

- TPCO argues that the Department should use TPCO's submitted FOP database to calculate TPCO's antidumping margin, and asserts that Petitioners' proposed AFA methodology is impermissible, even if the Department believed that the application of some facts available is required.

### **Department's Position:**

TPCO reported that it calculated a ratio of purchased to self-produced steel billets based on inventory withdrawals slips for five billet-consuming cost centers, showing the quantities of self-produced and purchased steel billets. This ratio determines not only the usage rate of purchased steel billets, but also the usage rates for all inputs used by TPCO in its production of steel billets, reported in TPCO's FOP database. During TPCO's verification, the Department discovered that this billet ratio was calculated incorrectly for two of the three cost centers examined by the Department. The errors were due to misclassifying and omitting consumption quantities of purchased steel billets, thereby understating the ratio for the consumption quantity of purchased steel billets. Specifically, one cost center clearly misclassified quantities of purchased steel billets as self-produced steel billet. The second cost center omitted the reporting of purchased steel billet quantities corresponding to inventory withdrawal slips issued during certain months within the POI.<sup>214</sup> In this regard, we note that TPCO recorded the quantities of self-produced and purchased steel billets withdrawn from inventory on a monthly basis in a report titled "Steel Billet Judgment Report" ("SBJR"). The SBJR identifies whether the quantities withdrawn from inventory by TPCO's steel billet-consuming cost centers are either purchased or self-produced based on certain heat numbers reflected in the inventory withdrawal slips, issued within a given month. Therefore, because the SBJR should have included the quantities of steel billets withdrawn from inventory in a given month based on inventory withdrawal slips issued within the same month, omitting the quantities of purchased steel billets from the SBJR in such a month provides clear evidence that quantities of purchased steel billets were indeed omitted from the SBJR for the second cost center. In TPCO's verification report, the Department stated that:

. . . we were not able to separately verify the POI consumption quantity of purchased steel billets and the POI consumption quantity of self-produced billets. We noted that numerous heat numbers and their corresponding steel billet consumption quantities were misclassified as being self-produced in the SBJR, when they should have been classified as purchased. Moreover, we noted that several heat numbers corresponding to purchased steel billets showed [\*\*\*\*] quantities in the SBJR. Company officials conceded that the calculation of the consumption quantity of purchased steel billets was incorrect.<sup>215</sup> (Note:

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<sup>214</sup> Id.

<sup>215</sup> See Verification of the Questionnaire Responses of Tianjin Pipe (Group) Corporation and Tianjin Pipe International Economic and Trading Corporation (collectively, "TPCO"), at page 16, dated July 1,

bracketed proprietary information omitted).

As a result of the aforementioned errors, the usage rates for purchased steel billets and the usage rates for the inputs used to produce steel billets were reported incorrectly in TPCO's FOP database. We note, however, that the Department was able to verify the overall quantity of the steel billet consumed during the POI. We believe that TPCO's failure to calculate the steel billet ratios, which determine the factors for TPCO's self-produced steel billets and the factor for purchased steel billet, could have been avoided, had the company put forth its maximum efforts when calculating such ratios for the most significant input used in the production of the subject merchandise; namely, steel billet. Accordingly, because the aforementioned FOP were not reported accurately in TPCO's FOP database, we have determined that the necessary information is not on the record regarding the consumption quantities of the inputs used in TPCO's self-produced steel billets and the consumption quantities of the input for purchased steel billets. See section 776(a)(1) of the Act. Furthermore, because the information provided by TPCO regarding the steel billet ratios could not be supported by the company's records, as indicated above, we determined that TPCO's reported data regarding the steel ratios could not be verified. See section 776(a)(2)(D).

Section 782(d) of the Act provides that if a response to a request for information does not comply with the request, the Department will inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy the deficiency within the applicable time limits and subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act provides that the Department "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all applicable requirements established by the administering authority" if the information is: (1) submitted by the deadline for its submission; (2) can be verified; (3) is not so incomplete that it cannot serve as a reliable basis for the applicable determination; (4) if the interested party demonstrated that it acted to the best of its ability in providing the information; and (5) the information can be used without undue difficulty.

TPCO's responses regarding its steel billet ratio do not meet the requirements for section 782(e) of the Act because TPCO did not submit the information by the deadlines established and the information cannot be verified. Therefore, TPCO has failed to satisfy the requirements of section 782(e) of the Act.

As the Department finds that the necessary information is not on the record, and that TPCO provided information that could not be verified, pursuant to sections 776(a)(1) and (2) of the Act, the Department finds that the use of facts available is warranted. Therefore, we have determined to use the facts otherwise available when calculating the FOP.

Once the Department finds that facts available is warranted, the Department must then determine

whether an adverse inference is warranted pursuant to section 776(b) of the Act. This provision permits the Department to apply an adverse inference if it makes the additional finding that an interested party has failed to cooperate by not acting to the best of its ability to comply with the Department's request for information. The CAFC has held that "the statutory mandate that a respondent 'act to the best of its ability' requires the respondent to do the maximum that it is able to do."<sup>216</sup> The court held:

{a}n adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e. under circumstances in which it is reasonable to conclude that less than full cooperation has been shown. While intentional conduct, such as deliberate concealment or inaccurate reporting surely evinces a failure to cooperate, the statute does not contain an intent element. 'Inadequate inquiries' may suffice. The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent.<sup>217</sup>

We determine that, within the meaning of section 776(b) of the Act that TPCO failed to cooperate by not acting to the best of its ability. TPCO failed to accurately calculate the ratios for steel billet, thereby rendering the reported usage rates in the FOP database unreliable. While TPCO contends that the errors were limited to a single cost center, the Department does not agree that the errors were so limited because, out of the three cost centers at which the Department looked, two of the cost centers had errors. As indicated above, the Department found that two of the three cost centers either misclassified or omitted quantities of purchased steel billets; thereby, understating the overall ratio of purchased to self-produced steel billet. Also, while TPCO's contention is that the errors were due to human error, the CAFC has held that "failure to cooperate" is not limited to situations in which the respondent deliberately concealed information, but applies to cases of "inaccurate reporting" as well as "inadequate inquiries."<sup>218</sup> In this case, TPCO's calculation of the purchased steel billet ratio impacts the entire FOP database because it determines the reported factors for both purchased and self-produced steel billets, and because steel billet is a major input into subject merchandise. Record evidence demonstrates that TPCO's improper calculation of the steel billet ratios understated the ratio for purchased steel billets, thereby understating the usage rates reported for purchased steel billets in TPCO's FOP database; thus we have determined that the application of partial AFA to TPCO's reported usage rates for purchased steel billets is warranted.

The Act provides that an adverse inference may include information derived from: "(1) the petition; (2) a final determination in the investigation under this subtitle; (3) any previous review under section {751 of the Act} or determination under {section 753 of the Act}; or (4) any other information placed on the record."<sup>219</sup> Accordingly, the Department has determined to use other

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<sup>216</sup> See Nippon Steel, 337 F. 3d at 1382.

<sup>217</sup> Id. at 1383.

<sup>218</sup> Id.

<sup>219</sup> See section 776(b) of the Act.

information placed on the record.<sup>220</sup> We agree with Petitioners' proposed alternative method of using, as partial AFA, the highest usage rate for purchased steel billets of any CONNUM sold to the United States, as the usage rate for purchased steel billets for all other CONNUMs sold to the United States. Specifically, the Department has determined to use the highest usage rate for purchased steel billets of any CONNUM sold to the United States, as the usage rate for purchased steel billets for all other CONNUMs sold to the United States.<sup>221</sup>

We disagree with Petitioners that total AFA should be applied to TPCO for failing to accurately calculate the aforementioned steel billet ratios because, as noted above, the Department was able to verify TPCO's overall consumption quantity of steel billet for the POI. In addition, while we agree with Petitioners that the Department has applied total AFA in certain situations in which it has discovered misclassifications and discrepancies at verification, the Department has examined the facts of this case and determined not to apply total AFA. Also, while we agree with TPCO that the Department was able to verify its total consumption quantity of steel billets, we disagree that information on the record corroborates TPCO's reported steel billet ratios because: (A) the source documents examined by the Department during TPCO's verification, upon which TPCO relied in calculating the steel billet ratio, and eventually reporting the consumption quantities of purchased steel billets, were found to be inaccurate for two of the three cost centers examined during the Department's verification of TPCO; and (B) there is no evidence on the record indicating that total quantity of steel billets purchased during the POI is the same as the total quantity of purchased steel billet consumed during the POI.

In an Affidavit submitted by Mr. Dan Porter of Winston & Strawn LLP counsel for TPCO in this proceeding, Mr. Porter made a number of assertions with respect to the Department's verification of the ratio used to identify the consumption of purchased steel billets from among the total steel billets consumed.<sup>222</sup> In his affidavit, Mr. Porter argued that: (1) the error found in TPCO's calculation of the steel billet ratio was isolated to one cost center; (2) upon discovering the error in the ratio calculation, TPCO officials promised to investigate the issue of misclassifying heat numbers by the following and last day of verification; (3) the Department verification team examined a revised chart reflecting the corrected ratio calculation that TPCO attempted to submit to the Department during verification; and (4) the Department decided that it only wanted to take as a verification exhibit evidence showing that errors were made in the calculation of the steel billet ratios. A memorandum issued by the Department in response to Mr. Porter's affidavit, indicates that certain of the events that transpired during TPCO's verification contradict Mr. Porter's assertions.<sup>223</sup> In its response to Mr. Porter's Affidavit, the Department noted the following: (1) the errors discovered in TPCO's calculation of the steel billet ratio were the result of misclassifying and omitting quantities of purchased steel billets for two cost centers examined

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<sup>220</sup> See section 776(b)(4) of the Act.

<sup>221</sup> Note: the highest usage rate of purchased steel billet is selected based on the CONNUMs in the FOP database that correspond to the reported CONNUMs in the U.S. sales database. See TPCO's Final Analysis Memo.

<sup>222</sup> See Mr. Daniel Porter's affidavit, dated July 21, 2010, in which he alleges that certain events occurred during the Department's verification of TPCO's steel billet ratio calculation.

<sup>223</sup> See the Department's Memorandum to the File: Response to Affidavit of Daniel Porter on Behalf of Tianjin Pipe (Group) Corporation and Tianjin Pipe International Economic and Trading Corporation (Collectively, "TPCO") (August 16, 2010) (*hereinafter*, the "Department's Response to Mr. Porter's Affidavit").

during TPCO's verification; (2) TPCO officials did not promise to investigate this issue overnight, as Mr. Porter contends, and had they done so, the verifiers would have informed them that there would not be sufficient time to examine their revised calculations, given that there were several outstanding documents and other data that needed to be examined on the following and final day of verification, especially since a significant amount of time had already been spent verifying TPCO's original ratio calculation; (3) contrary to Mr. Porter's allegation, at no time during verification did verifiers examine or review a chart showing corrections to TPCO's steel billet ratio calculation; and (4) the verifiers collected data for cost centers and months that had both errors and no errors.<sup>224</sup>

The Department has weighed all the evidence on the record regarding the versions of events that occurred at verification, including the affidavit of Mr. Porter, the memorandum in response to the affidavit, the verification report and exhibits. The Department notes that the version of events described in the memorandum in response to Mr. Porter's affidavit is consistent with the Department's established verification procedures and was prepared by the verifiers who were present at verification and witnessed the events in question, and whose assigned task was to conduct the verification and report the result of the verification for the record of this investigation. The Department finds that there is an insufficient basis upon which to conclude that the events at verification, as originally reported by the Department, are incorrect. Accordingly, based on the record evidence before it, the Department finds as a factual matter that the version of events described in the verification report and the memorandum in response to Mr. Porter's Affidavit is accurate. Accordingly, the Department has relied upon this description of events in making its determination to the extent that there is any conflict with the facts alleged in Mr. Porter's Affidavit.

**Comment 17: Whether TPCO is Affiliated with One of its U.S. Customers and Whether AFA or Partial AFA Should be Applied Because of Unreported Downstream Sales**

- TPCO argues that the Department's Preliminary Determination that TPCO and its U.S. customer (Company A)<sup>225</sup> are affiliated is contrary to law and the facts on the record.<sup>226</sup> TPCO contends that there is no evidence on the record showing that TPCO either manages or controls Company A because both companies share no ownership interest; no overlapping board of director members; no TPCO officials which participate in the management of Company A and no Company A officials which participate in the management of TPCO; and no exclusive supply arrangement between the two companies.
- TPCO maintains that the Department's finding of affiliation is based on its determination that Company B, which has a joint venture with TPCO, (Company D), Company C, which owns

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<sup>224</sup> For further details, see the Department's Response to Mr. Porter's Affidavit.

<sup>225</sup> See the memorandum "Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Proprietary Issues From the Issues and Decision Memorandum for the Final Determination," dated concurrently with this memorandum for details regarding proprietary information in this comment (Proprietary Memorandum").

<sup>226</sup> See the memorandum from Abdelali Elouaradia to John M. Andersen, "Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China ("PRC"): Tianjin Pipe (Group) Co, Affiliation," dated April 21, 2010 ("Affiliation Memorandum").

Company A, and Company A operate as a single entity (*hereinafter* “Company X”). TPCO contends that the Department’s single entity analysis in the Affiliation Memorandum, however, is based solely on the ownership structure, without considering the control relationship among the companies within Company X. TPCO argues that such a control relationship is necessary for the Department’s finding of a single entity. TPCO also argues that one of the companies must be wholly-owned by the other before the companies may be considered a single entity, but in this case there are outside shareholders, and so a finding that they are a single entity is contrary to law.

- In support of its argument, TPCO asserts that there is no evidence of a control relationship between Company B, Company C, and Company A. It also maintains that Company A is wholly owned by Company C, an entirely different legal entity than Company B, which has no ownership interest in Company C. TPCO further notes that Company D is a distributor of certain types of products and was not involved in any of TPCO’s sales of subject merchandise in the United States or in China during the POI. TPCO asserts that, while Company A is wholly-owned by Company C, Company B does wholly own Company C.
- TPCO maintains that the Department’s Affiliation Memorandum cites to NACCO Materials Handling Group, Inc. vs. United States (“NACCO”),<sup>227</sup> even though the fact pattern involving the Department’s decision to merge two entities in that case differs from the facts present in this instant case. According to TPCO, the Department’s decision to merge two entities in NACCO involved a parent company that wholly owned the subsidiary; and both entities were an importer and exporter combination with respect to U.S. sales of the subject merchandise. TPCO argues that, in stark contrast to NACCO, no such ownership structure exists in this case between the companies within Company X, as Company B owns only [\*\*\*]<sup>228</sup> percent share in Company C; not a complete, 100 percent ownership deemed critical by the Department and Court in NACCO. Also, while NACCO involves an affiliated exporter and importer of the subject merchandise, Company A, Company B, and Company C are not an affiliated exporter-importer combination of the subject merchandise. TPCO further asserts that the other two cases cited by the Department in the Affiliation Memorandum,<sup>229</sup> reflect circumstances under which the Department determined that two or more companies constitute a single entity, different from those companies present in this instant case. According to TPCO, in the administrative review for Hot-Rolled Steel from Romania, Ispat Sidex submitted a consolidated response for itself and its subsidiary, Sidex Trading, acknowledging that both companies were affiliated. Accordingly, the Department treated them as a single entity. TPCO argues that the scenario in this instant investigation is different from Hot-Rolled Steel from Romania in that Company B, Company C and Company A did not submit a consolidated response, and Company B had no relationship to the investigation or the subject merchandise. Moreover, TPCO maintains that in Hot-Rolled Steel from China, the Department treated Baoshan Co. Ltd. and Baosteel International as a single

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<sup>227</sup> 971 F. Supp. 586, 591 (Ct. Int’l Trade 1997).

<sup>228</sup> See Proprietary Memorandum.

<sup>229</sup> See Certain Hot-Rolled Carbon Steel Flat Products from Romania: Preliminary Results of Antidumping Duty Administrative Review, 69 FR 70644 (December 7, 2004) (“Hot-Rolled Steel from Romania”); Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People’s Republic of China, 66 FR 22183 (May 3, 2001) (“Hot-Rolled Steel from China”).

entity because Baoshan Co. Ltd. produced the subject merchandise sold to the United States and Baosteel International sold the subject merchandise to the United States. Id. According to TPCO, Hot-Rolled Steel from China is irrelevant because Company B and Company C neither produced nor exported the subject merchandise.

- Moreover, TPCO argues that, even if Company B, Company C, and Company A are considered a single entity, there is no evidence that TPCO and Company A are affiliated under section 771(33)(F), absent any evidence that Company X is legally or operationally in a position to exercise restraint or direction over Company D; and has the potential to impact decisions concerning the production, pricing or cost of the subject merchandise.<sup>230</sup>
- TPCO maintains that the [\*\*\*]<sup>231</sup> percent ownership of Company B in Company D and Company B's ability to be involved in the decision making process of Company D are of little relevance with respect to whether Company B is legally or operationally in a position to exercise restraint or direction over Company D's day-to-day decisions. TPCO further contends that the General Manager is the person that makes the day-to-day decisions, and has the ability to impact decisions regarding production and sales of the subject merchandise.
- Moreover, TPCO argues that for the Department's affiliation finding to be permissible under section 351.102(b), the record evidence must provide affirmatively that Company B's relationship with Company D has the potential to impact decisions concerning production, pricing, or cost of the subject merchandise. According to TPCO, there is no evidence in support of the Department's conclusion that the requisite for the control test has been satisfied because Company D was not involved in the subject merchandise, and, therefore, it cannot be argued that such potential exists.<sup>232</sup>
- Furthermore, TPCO contends that, even if the Department finds that TPCO is affiliated with Company A, there is no justification for applying AFA to TPCO's downstream sales through Company A because TPCO made every effort to respond to the Department's requests for information and cooperated to the best of its ability, despite the challenges it faced in obtaining the downstream sales of Company A. TPCO also asserts that it attempted to submit the downstream sales on the record, but the Department refused to grant TPCO an additional 10 day extension to submit the sales at issue. TPCO contends that the Department had ample time to accept, analyze, and verify the downstream sales data for purposes of the final determination, and that the Department's rejection of the data hindered the Department's ability to calculate an accurate dumping margin. TPCO also claims that if the Department had accepted the downstream sales data, interested parties would have had ample time to review and comment on the data, and the acceptance of such data would not have altered the schedule of the investigation.

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<sup>230</sup> See TIJD v. United States, 366 F. Supp. 2d 1286 (CIT 2005); Hontex Enterprises, Inc. v. United States, 387 F. Supp. 2d 1353 (CIT 2005) ("TIJD").

<sup>231</sup> See Proprietary Memorandum.

<sup>232</sup> See Notice of Final Results and Rescission, in Part, of the Antidumping Duty Administrative Review: Petroleum Wax Candles From the People's Republic of China, 69 FR 12121 (March 15, 2004) at Comment 2; Alloy Piping Products Inc. v. United States, 2008 Ct. Intl. Trade 34 (March 13, 2008).



- TPCO argues that the Department's refusal to accept the data violates the World Trade Organization (WTO) Antidumping Duty Agreement, which provides that the Department must provide 30 days to submit questionnaire responses, and in this case, the Department did provide Company A with only 15 days to respond.<sup>233</sup> TPCO argues that the facts do not indicate that TPCO failed to cooperate pursuant to 19 CFR 351.408.
- Finally, TPCO argues that, since the Department refused to accept TPCO's downstream sales of Company A, and has already verified TPCO's sales, including its sales to Company A the Department should, as facts available, use TPCO's original sales database for purposes of the final determination.
- Petitioners argue that the information on the record upon which the Department relied in reaching its preliminary decision that Company A and TPCO are affiliated is supported by the record evidence, and is consistent with the Department's determination in OCTG from China.
- Petitioners maintain that there are two elements that must be met for affiliation to exist under section 771(33)(F) of the Act: (i) two parties must be legally or operationally in a position to exercise restraint or direction over a third party; and (ii) the relationship with the third party must have the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.<sup>234</sup> Petitioners further note that in analyzing both elements the courts and the Department have emphasized that evidence showing that control has been exercised is not required; instead, it is the ability to control that is at issue here.<sup>235</sup> Petitioners argue that these determinations are consistent with the Preamble, which states, “{i}n general ... we focus on relationships that have the potential to impact decisions concerning production, pricing or cost. This does not mean however, that proof is required that a relationship in fact has had an impact.”<sup>236</sup>
- According to Petitioners, in this case, as in OCTG from China, each of the relevant factors has been established. Petitioners assert that it is clear that Company A and Company B are properly considered to be a single entity, as Company B is the parent of Company A.<sup>237</sup> Moreover, Petitioners assert that, as in OCTG from China, the facts on the record establish affiliation between TPCO and Company A through their ability to exercise control over Company D.
- Petitioners maintain that with respect to the first part of the affiliation test, the evidence shows

<sup>233</sup> See WTO Antidumping Agreement, Art. 6.1.1; United States- Antidumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (July 24, 2001).

<sup>234</sup> See section 771(33)(F) of the Act (emphasis added); Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316 at 838; 19 CFR 351.102(b)(3).

<sup>235</sup> See Electrolytic Manganese Dioxide From Japan: Final Results of Antidumping Duty Administrative Review, 65 FR 55939 (Sept. 15, 2000) at Comment 2; Oil Country Tubular Goods From Japan: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 64 FR 48589, 48591 (Sept. 7, 1999); Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 63 FR 55578 (Oct. 16, 1998).

<sup>236</sup> See Antidumping Duties; Countervailing Duties, 62 FR 27296 (May 19, 1997).

<sup>237</sup> See Petitioner's Pre-Preliminary Comments at Ex. 2, pp. 2, 14-15 (BPI Version).

that TPCO and Company B are each legally and operationally in a position to exercise restraint or direction over a third person, namely Company D. Specifically, Petitioners contend that TPCO has the ability to exercise control through its ownership and involvement in Company D. They further assert that, even though Company B is a minority shareholder, it has the ability to exercise restraint or direction over Company D by virtue of its involvement as a decision maker in Company D's. Thus, Petitioners assert that Company X, which includes Company A has the ability to restrain or direct the activities of Company D.

- With respect to the second element of the affiliation test, Petitioners argue that because Company D is in the business of selling and distributing certain products, it is clear that the relationship between the relevant parties through Company D has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. Thus, according to Petitioners, affiliation is properly established. Petitioners also argue that, although TPCO and Company A are clearly affiliated through their relationship with Company D, there are additional indicia of affiliation between TPCO and Company A because TPCO and Company A are also affiliated through their relationship with Company E. TPCO and Company E have a relationship through Company F.<sup>238</sup> In turn, Company E and Company A are partners through other entities.<sup>239</sup> Petitioners argue that, in the verification report for Company E in OCTG from China that was placed on the record in this case by TPCO, Company E and Company A also have certain relationships.<sup>240</sup> According to Petitioners, this demonstrates that TPCO and Company A are in a position to exercise restraint or direction over Company E, and because this relationship involves companies that are engaged in certain products, it has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.
- Petitioners refute TPCO's claims that Company B's [\*\*\*]<sup>241</sup> percent ownership in Company C is not sufficient in a finding of affiliation or control.<sup>242</sup> Petitioners argue that TPCO provided no support for its argument that [\*\*\*]<sup>243</sup> percent ownership is necessary to treat a parent company and its subsidiary as a single entity. Second, Petitioners note that the remaining shares of Company C are held by Company G and Company H, the owners of Company B.<sup>244</sup>
- Petitioners refute TPCO's claim that there is no factual evidence regarding the relationship or level of control between the other two companies owning [\*\*\*]<sup>245</sup> percent of Company C, i.e., Company I and Company J, and their parent companies, Company G and Company H, respectively,<sup>246</sup> and the fact that Companies G and H jointly own Company B. Petitioners maintain that the information on the record shows that Companies I and J "are wholly owned

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<sup>238</sup> See Proprietary Memorandum.

<sup>239</sup> Id.

<sup>240</sup> See TPCO's Response to Supplemental Sections A, C, and D at Ex. S2-1 (BPI Version).

<sup>241</sup> See Proprietary Memorandum.

<sup>242</sup> See TPCO's case brief at 86-87.

<sup>243</sup> See Proprietary Memorandum.

<sup>244</sup> See TPCO's Response to Supplemental Sections A, C, and D at 4 (BPI Version).

<sup>245</sup> See Proprietary Memorandum.

<sup>246</sup> Id.

subsidiaries” of Companies G and H.<sup>247</sup> Thus, according to Petitioners, Company C is [\*\*\*]<sup>248</sup> percent owned by Company B and the owners of Company B. Petitioners note that Company I and Company J hold shares in Company C in the same ratio that Company G and Company H hold shares in Company B.<sup>249</sup>

- Moreover, Petitioners argue that Company B has control over Company C and, therefore, Company A. Petitioners further argue that such a control relationship is not limited strictly to ownership since Company B is also involved in other aspects pertaining to Company C.<sup>250</sup> Accordingly, Petitioners argue that there can be no question that the Department properly treated Company A and Company B as a single entity.
- Petitioners argue that the Department has already rejected the arguments raised by TPCO regarding the CIT’s decision in NACCO, and that TPCO has not presented additional argument which would compel the Department to revisit that decision.<sup>251</sup>
- Moreover, Petitioners refute TPCO’s argument that there is no evidence that Company B has the ability to exercise restraint or direction over a third party’s day-to-day business decisions. Petitioners argue that TPCO provided no evidence in support of its claim that there must be evidence of control over the third person’s day-to-day business operations. Petitioners note that the record shows that Company B and Company A have sufficient ability to exercise control over Company D.
- Furthermore, Petitioners find no merit in TPCO’s claim that the second part of the affiliation test is not met. According to Petitioners, the second part of the test requires a finding that “the relationship has the potential to impact decisions concerning the production, pricing or cost of the subject merchandise or the foreign like product.” Petitioners refute TPCO’s assertion that Company D was not involved in the sales of the subject merchandise during the POI.<sup>252</sup> Accordingly, Petitioners argue that because Company D sells certain products, the relationship has the potential to impact decisions concerning the production, pricing or cost of the foreign-like product.
- Additionally, Petitioners assert that there is no basis for TPCO’s contention that affiliation requires that the controlled third party be directly connected to the subject merchandise.<sup>253</sup> According to Petitioners, the Department has recognized, to the contrary, that even though the controlled third party is engaged in a business that is related “directly to another product or another type of commercial activity,” the control of such a party “could affect decisions

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<sup>247</sup> See TPCO’s Apr. 5 Submission at Ex. SR-1.

<sup>248</sup> See Proprietary Memorandum.

<sup>249</sup> See TPCO’s Apr. 5 Submission at 1.

<sup>250</sup> See Affiliation Memo at 3.

<sup>251</sup> See OCTG from China at Comment 10.

<sup>252</sup> See TPCO’s Apr. 5 Submission at Ex. SR-2.

<sup>253</sup> See OCTG from China at Comment 10 (distinguishing Notice of Final Results and Rescission, in Part, of the Antidumping Duty Administrative Review: Petroleum Wax Candles From the People’s Republic of China, 69 FR 12121 (March 15, 2004)).

involving the production, pricing or cost of the merchandise under consideration.”<sup>254</sup> Thus, Petitioners argue that the second prong of the affiliation test is satisfied in this case because TPCO’s and Company A’s affiliation through Company D has the potential to impact decisions regarding the subject merchandise or the foreign-like product. Petitioners disagree with TPCO that this determination is contrary to the Department’s prior practice. For the reasons discussed above, Petitioners argue that the Department should continue to find affiliation between TPCO and Company A in the final determination.

- With respect to TPCO’s downstream sales through Company A, Petitioners maintain that since the Department properly determined that TPCO and Company A are affiliated companies, TPCO’s U.S. price cannot be based on sales to an affiliated customer,<sup>255</sup> but should instead be based on Company A’s downstream sales.
- Moreover, Petitioners argue that since TPCO failed to report these downstream sales, despite being provided with multiple opportunities and extensions of time to do so, the Department must continue applying partial AFA in the final determination.<sup>256</sup> Petitioners assert that that TPCO failed to do the maximum it was able to do to provide the information requested by the Department in order to calculate the company’s dumping margin.
- Petitioners refute TPCO’s claims that there was “no legitimate justification” for the Department to refuse to grant TPCO’s April 9 extension request and to accept the untimely filed data that TPCO ultimately submitted because Petitioners argue that the Department has rejected this argument before, citing Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Japan, where the Department stated that “any information submitted after the deadline specified in the questionnaire is untimely, regardless of whether the general deadline in section 351.301(b)(1) has passed.”<sup>257</sup> Petitioners maintain that TPCO had already been given multiple opportunities and extensions of time to provide the data in question. Petitioners argue that to grant TPCO’s request and to accept its late data would render the deadlines set by the Department meaningless.
- Moreover, Petitioners argue that if respondents were able to submit entirely new sales data up until one week prior to verification, the Department would not be able to properly develop the factual record with respect to such sales data, and petitioners would be severely prejudiced because they would be deprived of any ability to analyze and meaningfully comment on the data prior to verification. Finally, Petitioners argue that TPCO’s reliance on a WTO decision is misplaced, since such a determination is not based on U.S. law and is irrelevant here.
- Petitioners argue that if the Department does not apply total AFA to TPCO, then the Department should select either the highest CONNUM-specific dumping margin for any respondent or the petition rate as partial AFA, whichever is greater, to calculate the dumping margin for TPCO’s

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<sup>254</sup> See Antidumping Duties; Countervailing Duties, 62 Fed. Reg. at 27296-27298.

<sup>255</sup> See 19 U.S.C. §§ 1677a(a) and (b) .

<sup>256</sup> See section 776(b) of the Act; 19 CFR §351.308(a); NSK v. United States, 481 F.3d 1355, 1361 (Fed. Cir. 2007).

<sup>257</sup> See Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Japan, 64 FR 24329, 24357-61 (May 6, 1999); see also Wooden Bedroom Furniture from the People’s Republic of China, 69 Fed. Reg. 67313 (Dep’t Commerce Nov. 17, 2004) at Comment 82.

downstream sales. Petitioners argue that this method would be consistent with practice and serves the purpose of AFA.

### **Department's Position:**

In the Preliminary Determination, consistent with OCTG from China, the Department determined that TPCO and Company A are affiliated. The Act provides that affiliated persons are “two or more persons directly or indirectly controlling, controlled by, or under common control with, any person,” and any person who controls any other such person, and that person, are considered to be affiliated. See section 771(33)(F) and (G) of the Act. The Act further provides that “a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.” See section 771(33) of the Act. The Department’s regulations state that, in determining whether control exists, the Department will consider “corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships.” See 19 CFR 351.201(b). However, the Department will not find control on these bases “unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.”<sup>258</sup> The Department’s determination was based on the Department’s finding that: (A) Company B, Company C, and Company A are affiliated pursuant to sections 771(33)(E), (F), and (G) of the Act, and constitute a single entity (*hereinafter*, Company X); and (B) Company X and TPCO are legally or operationally in a position to exercise restraint or direction over Company D; and that such a relationship has the potential to impact decisions concerning the production, pricing or cost of the subject merchandise or the foreign-like product.<sup>259</sup> While TPCO has presented additional arguments regarding affiliation, it has not presented new evidence that warrants a change from our Preliminary Determination. TPCO’s arguments also do not compel us to change our determination that TPCO and Company B, Company C, and Company A are affiliated by virtue of the ownership and control relationship among these companies.

In its Affiliation Memo, the Department set forth the following facts: first, Company B owns [\*\*\*]<sup>260</sup> percent of Company C, which, in turn, owns [\*\*\*]<sup>261</sup> percent of Company A. Second, Company B, Company C, and Company A are all ultimately owned by the same two companies. Third, Company C owns [\*\*\*]<sup>262</sup> of Company A, and Company C, in turn, is [\*\*\*]<sup>263</sup> percent owned by Company B. Company B is involved in the decision making process of Company C.<sup>264</sup>

Based on these facts, the Department determined that Company B, Company C, and Company A are affiliated under section 771(33)(E) of the Act (a person directly or indirectly owning five percent or more of the shares of an organization and that organization are affiliated). Next, because these three companies are all owned by the same two companies, these three companies

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<sup>258</sup> See 19 CFR 351.102(b); see also TIJID, INC. v. United States, 366 F. Supp. 2d 1286 (CIT 2005).

<sup>259</sup> See the Affiliation Memorandum.

<sup>260</sup> See Proprietary Memorandum.

<sup>261</sup> Id.

<sup>262</sup> Id.

<sup>263</sup> Id.

<sup>264</sup> See Affiliation Memorandum at 3 (citing page 5 of TPCO’s April 5, 2010, submission); see also Proprietary Memorandum.

are also affiliated through this ownership pursuant to section 771(33)(F) of the Act (two or more persons under common control). Due to the ownership by Company C of Company A, the Department determined that these companies were affiliated under section 771(33)(E) of the Act. The fact that Company C is [\*\*\*]<sup>265</sup> percent owned by Company B, and that Company B is involved in the decision making process of Company C, the Department determined that Company B also controlled Company C. We found “control” based on the statutory definition of control, that a person is legally or operationally in a position to exercise restraint or direction over another person.<sup>266</sup> The Department stated that, Company B’s direct and indirect ownership of Company C and Company A, and the fact that it is involved in other aspects involving Company C, places it in a position to exercise restraint or direction over these companies.”<sup>267</sup> Therefore, the Department found Company B, Company C, and Company A to be affiliated pursuant to section 771(33)(G) of the Act.

Moreover, for the Preliminary Determination, the Department found that Company B, Company B, and Company A may be treated as a single entity, stating that: “{t}he Department treats affiliated entities as a single entity where the parent company owns or controls directly or indirectly its subsidiary company or its subsidiary’s subsidiary such that the legally separate companies may operate as a single entity.”<sup>268</sup> The Department determined, based on Company B’s level of ownership and control of Company C and Company C’s ownership of Company A, that these [\*\*\*]<sup>269</sup> affiliated companies could act in concert and be effectively operated as a single entity.<sup>270</sup> The Department also found that “the fact that the shareholders of Company B own the remaining equity interest in Company C through their wholly-owned subsidiaries, support the determination that it is appropriate to treat those companies as a single entity.”<sup>271</sup> Based on the record, the Department finds that the above findings made in the Preliminary Determination continue to be supported by the evidence and incorporates the analysis and findings in this final determination.

We disagree with TPCO that there is no evidence that TPCO has control over Company A. The Department first determined that Company B, Company C, and Company A should be treated as a single entity.<sup>272</sup> TPCO contends that Company B’s ownership in Company C is insufficient for a finding of affiliation or control.<sup>273</sup> However, the remaining of Company C’s shares are owned by the owners of Company B. In other words, there are no outside shareholders in the single entity, since the remaining shares of Company C are held by the owners of Company B. In addition, ownership is not the only factor considered by the Department in its determination that

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<sup>265</sup> See Proprietary Memorandum.

<sup>266</sup> See section 771(33)(G) of the Act; SAA at 838.

<sup>267</sup> See Affiliation Memorandum at 3.

<sup>268</sup> Id. at 4 (citing NACCO Materials Handling Group, Inc. v. United States, 971 F.Supp. 586, 591 (CIT 1997) (“NACCO”). See also, e.g., Certain Hot-Rolled Carbon Steel Flat Products from Romania: Preliminary Results of Antidumping Duty Administrative Review, 69 FR 70644 (December 7, 2004) (“Hot-Rolled from Romania Prelim”); Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China, 66 FR 22183 (May 3, 2001) (“Hot-Rolled from China Prelim”).

<sup>269</sup> See Proprietary Memorandum.

<sup>270</sup> Id. at 4 (citing NACCO at 971 F. Supp. at 591).

<sup>271</sup> Id.

<sup>272</sup> Id. at 3.

<sup>273</sup> Id. at 86-87.

the aforementioned companies operate as a single entity. In addition to the ownership structure noted above, and as indicated in the Department's Affiliation Memorandum, Company B's control is also evidenced by the fact that it is involved in other aspects pertaining to the operation of Company C, which is the sole owner of Company A. Accordingly, as noted above, given Company B's level of ownership, the fact that the owner of Company B holds the remaining ownership interest in Company C; the control through the power of being involved in the operation of Company C; and Company C's ownership of Company A, the Department continues to find it appropriate to treat the aforementioned companies as a single entity for purposes of the final determination.

TPCO argues that the cases to which the Department cited in its Affiliation Memorandum do not support its determination to find that the three companies should be treated as a single entity. The Department agrees with Petitioners that there is no bright-line test for determining whether companies operate as a single entity; this decision must be made based on the specific facts of each case.<sup>274</sup> For instance, TPCO contends that "none of the crucial facts {in NACCO} exist in this case" because, for instance, the case involving an exporter and U.S. importer.<sup>275</sup> The Department cited NACCO in its Affiliation Memorandum in support of the proposition that companies may be treated as a single entity where ownership or control between the parent company and subsidiary, or its subsidiary's subsidiary, "such that the legally separate companies may operate as a single entity."<sup>276</sup> In NACCO, the question posed by the CIT in its remand order was whether the Department has a practice of consolidating parent companies and subsidiaries, which the Department confirmed.<sup>277</sup> There is no indication that the Department or the CIT relied solely upon the importer/exporter relationship as the basis for finding affiliation. Instead, the Department treated three companies as a single entity because "TMC directly owns 100 percent of TMS and indirectly owns, through TMS 100 percent of TMCC."<sup>278</sup> The Department also disagrees that its determinations in Hot-Rolled from Romania and Hot-Rolled from China do not support its finding that these three companies should be treated as a single entity. For instance, the fact that the respondent in Hot-Rolled from Romania requested that it, and its trading company, be treated as a single entity does not justify a different outcome here; in this case, the Department determined that there was both ownership and control between the three companies, pursuant to the Act and regulations, such that the companies should be treated as a single entity.

As to TPCO's affiliation with the Company X through TPCO's joint venture in Company D, the Department noted in the Affiliation Memorandum that the Act requires that the Department find control as described by the provision, and that one of the relationships for which control may be found is where two or more persons are legally or operationally in a position to exercise restraint or direction over a third person. The Department noted that one of the relationships expressly included in the regulations which may indicate control, are joint venture agreements. The Department also noted that, in such relationships, control will not be found unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of

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<sup>274</sup> See Petroleum Wax Candles at Comment 1.

<sup>275</sup> See TPCO case brief at 90.

<sup>276</sup> See Affiliation Memo at 4.

<sup>277</sup> See NACCO, 971 F. Supp. at 589-91.

<sup>278</sup> Id. at 591; see also OCTG from China at Comment 10 (rejecting TPCO's argument that NACCO is inapplicable).

the subject merchandise or foreign like product.<sup>279</sup> In its Affiliation Memorandum, the Department noted that TPCO is in a relationship with Company X, and that the relationship has the potential to impact certain decisions. The Department elaborated:

We disagree with TPCO that our analysis did not consider whether this relationship has the ability to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. First, we agree with Petitioners that the Act and regulations do not require that Company X must impact day-to-day operations of Company D. In addition, we continue to find that Company X's ability to be involved in Company D's operations is an ability which has the impact to affect decisions concerning production, pricing, and cost because the [\*\*\*]<sup>280</sup>. As the Department stated in its Affiliation Memorandum,

The Act clearly states that the analysis is whether two or more persons are "legally or operationally in a position to exercise restraint or direction over the other person." See section 771(33) of the Act; see also *Ferro Union, Inc. v. United States*, 44 F. Supp. 2d 1310, 1324-25 (1999). Under this standard, we find that the Company X entity has control over Company D because it is in a position to exercise restraint or direction as demonstrated by the above analysis, particularly in light of the fact that Company D [\*\*\*\*\*]. See e.g., page 4 of TPCO's April 5, 2010 submission. Therefore, we determine that TPCO and the [\*\*\*\*\*] entity are affiliated on the basis of their joint venture in [\*\*\*\*\*]. The record demonstrates that there is potential to impact decisions concerning the pricing, production or cost of the subject merchandise or the foreign like product, including the pricing of the seamless pipe sold by TPCO to [\*\*\*\*\*] in the United States. Such pricing decisions could be compensated for through the sales or other interactions between TPCO and the [\*\*\*\*\*] entity through the joint-venture [\*\*\*\*\*]. Accordingly, because the importer, [\*\*\*\*\*] is part of the [\*\*\*\*\*] entity, the relationship of TPCO to [\*\*\*\*\*] is that of an exporter and an affiliated importer.

The relevant facts on the record have not changed since the Department's Preliminary Determination. The record evidence shows that TPCO is involved with Company X, and the relationship between TPCO and the Company X demonstrates that TPCO and the Company X are affiliated. Based on the record, the Department finds that the above findings made in the Preliminary Determination continue to be supported by the evidence and incorporates the analysis and findings in this final determination. We disagree with TPCO's assertion that there

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<sup>279</sup> See section 351.102(b) of the Department's regulations.

<sup>280</sup> See Proprietary Memorandum.



is no evidence that Company X has the ability to exercise restraint or direction over Company D and that Company X's involvement in Company D is of little relevance. We also disagree with TPCO's assertion that control over the third person is only evidenced by the actual control over such a person's day-to-day business operations. "Control" means that a person is legally or operationally in a position to exercise restraint or direction over another person, and that actual exercise of control is not required, merely the ability to exercise restraint or direction.<sup>281</sup>

Moreover, contrary to TPCO's assertion, we agree that the relationship between TPCO and Company X has the potential to impact decisions concerning the production, pricing or cost of the subject merchandise or the foreign like product. For the reasons indicated above, the Department continues to find TPCO and Company A affiliated in the final determination.

We find, contrary to TPCO's assertion, that this determination is not contradictory to the CIT's holding in TIJID. In TIJID, the Department was affirmed as to its finding that the respondent, an importer, was not affiliated with its supplier. The Department determined that the importer did not control the supplier, and that, although the supplier's CEO sat on the board of two Hong Kong companies that were owned by the importer, this was insufficient to show that the supplier had the potential to impact decisions concerning the production, pricing or cost of merchandise.<sup>282</sup> The CIT held that the Department "must weigh the nature of entities' contacts over time, and must determine how such contacts potential impact each business decisions. Sporadic or isolated contacts between entities, absent significant impact, would be less likely to lead to a finding of control." The Department determined whether control existed based on the specific facts of that case, which did not indicate that the supplier's involvement on the board of the Hong Kong companies demonstrated control over the importer. In this case, the facts demonstrate the opposite, as discussed above.

Additionally, we disagree with TPCO's assertion that it cooperated to the best of its ability to provide the Department with Company A's downstream sales, as such an assertion is contradicted by the fact that the Department repeatedly requested that TPCO submit the downstream sales of Company A, but TPCO failed to do so in a timely manner which impeded the proceeding and does not demonstrate that TPCO acted to the best of its ability in complying with the Department's requests for information.<sup>283</sup> Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form or manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, the Department shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act allows the Department, subject to section 782(e) of the Act, to disregard all or part of a deficient or untimely response from a respondent. Pursuant to 782(e), the Department may not decline to consider information that is submitted by an interested party and is necessary to the determination if such information is submitted by the deadline established for its submission. In this case, TPCO did not report Company A's

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<sup>281</sup> See section 771(33) of the Act.

<sup>282</sup> See TIJID, 366 F. Supp. 2d at 1294 (quoting Hontex Enterprises v. United States, 248 F. Supp. 2d 1323, 1344 n. 17 (CIT 2003)).

<sup>283</sup> For further details, see the Preliminary Determination at page 22379.

downstream sales, as requested by the Department, in a timely manner. In its original questionnaire to TPCO, dated November 6, 2009, the Department requested that TPCO report the downstream sales of its affiliated customers; not its sales to affiliated customers. Moreover, the Department specifically requested that TPCO submit Company A's downstream sales on March 3, 2010, and March 25, 2010, respectively, and extended the deadline for submitting such information twice. The last extended deadline was on April 9, 2010. However, instead of submitting the requested downstream sales on that date, TPCO requested yet another extension of the deadline to submit such data, until April 19, 2010, two days before the deadline of the Preliminary Determination of this investigation, dated April 21, 2010, which had been already fully extended. Therefore, the Department rejected TPCO's April 9, 2010 request for an additional extension of time to submit the downstream sales data in question, and rejected TPCO's submissions of such data on April 19, 2010, and April 30, 2010, respectively, because the downstream sales data were untimely submitted. Accordingly, since TPCO's downstream sales data were untimely submitted and there are no compelling arguments that warrant a change to the Department's preliminary decision, the Department determines, consistent with section 776(a)(2)(A), (B), (C) and (D), as well as sections 782(d) and (e), to continue applying partial AFA to TPCO's unreported downstream sales through Company A in the final determination.

Furthermore, in selecting from among the facts available ("FA"), we have determined, pursuant to section 776(b) of the Act, that it is appropriate to continue using an adverse inference because TPCO failed to cooperate by not acting to the best of its ability to comply with a request for information. Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."<sup>284</sup> The Court of Appeals Federal Circuit ("CAFC"), in Nippon, provided an explanation of the "failure to act to the best of its ability" standard, stating that the ordinary meaning of "best" means "one's maximum effort," and that the statutory mandate that a respondent act to the "best of its ability" requires the respondent to do the maximum it is able to do.<sup>285</sup> The CAFC indicated that inadequate responses to agency inquiries "would suffice" as a basis for finding that a respondent has failed to cooperate to the best of its ability.<sup>286</sup> Compliance with the "best of its ability" standard is determined by assessing whether a respondent has put forth its maximum effort to provide the Department with full and complete answers to all inquiries in an investigation.<sup>287</sup> As indicated in the Preliminary Determination, TPCO repeatedly failed to provide the Department with the downstream sales of its affiliated customer Company A; and by doing so, failed to act to the best of its ability to provide the Department with the information requested, thereby, impeding this proceeding. Accordingly, we have determined that TPCO failed to cooperate by putting forth its maximum effort to obtain the data and, hence, has not acted to the best of its ability to comply with a request for information.

We also disagree that the Department's determination to apply partial AFA violates the Department's regulations, since we have determined that TPCO significantly impeded the proceeding and failed to provide information by the time requested, and determine that TPCO

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<sup>284</sup> See SAA at 870.

<sup>285</sup> See Nippon Steel Corporation v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003) ("Nippon").

<sup>286</sup> Id. at 1380.

<sup>287</sup> Id. at 1382.

failed to cooperate by not acting to the best of its ability.<sup>288</sup> We also disagree that TPCO was provided insufficient time to submit the data. The fact that they attempted to submit the data after the deadline, even after multiple extensions, does not mean that the Department should have provided additional time.

These repeated failures prevented the timely receipt of essential information required by the Department to calculate an accurate dumping margin. We further note that even if the Department had further extended the deadline, any submission would have been too late for the Department to: (a) analyze Company A's downstream sales, which had not been previously examined; (b) allow the interested parties in this proceeding the opportunity to comment on such a submission; (c) issue detailed questionnaires to TPCO for any additional information needed to clarify or supplement the new data; and (d) use the data in the Department's calculation of TPCO's margin for the preliminary determination.

The Department could not have accepted the downstream sales data in question, as TPCO argues it should have, on April 19, 2010, just two days before the April 21, 2010, deadline for the preliminary determination, which was already fully extended, because the Department would not have been afforded sufficient time to analyze the new data within such a limited amount of time prior to the deadline of the preliminary determination. In order to have accepted such data, the Department would have found it necessary to issue a significant revision of its preliminary determination. Under such a scenario, there would have been a cascading effect on other significant scheduled events in the preparation and administration of the Department's handling of this investigation. For example, the scheduled dates for the Department's verification of TPCO's responses, which would have required further extension of deadlines to include the additional verification of Company A's downstream sales, the Department's verification reports for TPCO, and the comments in the case and rebuttal briefs raised by the interested parties in this proceeding, all would have been significantly delayed. These delays would have further impeded the Department's ability to fully analyze and address the issues and comments raised by the parties in this investigation within the remaining time available prior to the deadline for the Department's final determination.

Accordingly, consistent with the Preliminary Determination, we continue to find that it is appropriate to use adverse inferences in selecting the FA on which to base TPCO's dumping margin, in part, for the final determination. Specifically, in the final determination, the Department continues to use, as partial AFA, the highest control number-specific dumping margin calculated for TPCO. No corroboration of this rate is necessary because the information we are relying on as partial AFA was obtained in the course of this investigation from TPCO and is not secondary information.<sup>289</sup> We note that this margin bears a direct relationship to TPCO's actual experience, since it is a margin which we have calculated for TPCO in this investigation.

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<sup>288</sup> See 19 CFR 351.308.

<sup>289</sup> "Secondary information" is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise. See SAA at 870.

## Comment 18: Whether Targeted Dumping Exists

- Petitioners contend that since TPCO failed to report the downstream sales of one of its affiliated U.S. customers, the Nails Test<sup>290</sup> shows that TPCO engaged in targeted dumping by time period when sales to the affiliated customer are included in the analysis, as partial AFA, the Department should presume that TPCO engaged in targeted dumping. Petitioners state that TPCO should not be allowed to benefit from its failure to cooperate.
- If the Department does not presume, as partial AFA, that targeted dumping occurred Petitioners argue that the Department should use the “preponderance at 2 percent” (P/2) test from coated free sheet paper from Korea to determine whether targeted dumping occurred.<sup>291</sup> According to Petitioners, the P/2 test is in accordance with the statute and Departmental policy for analyzing prices in other contexts, while the Nails Test is unlawful, fundamentally flawed and wrongfully places undue burden on Petitioners to demonstrate that targeted dumping occurred. Petitioners argue that the Department has recognized that imposing thresholds that prevent the use of the targeted dumping methodology is contrary to Congressional intent and denies relief to domestic industries.<sup>292</sup>
- After determining that targeted dumping has occurred (either as partial AFA or by using the P/2 test which shows that TPCO engaged in targeted dumping by region), Petitioners assert that the Department should apply the average-to-transaction methodology to *all* of TPCO’s sales, and use zeroing when doing so.<sup>293</sup>
- TPCO strenuously objects to the affiliation finding that lies at the heart of Petitioners’ argument, and claims that it has fully cooperated in this investigation and explained in detail why there is no basis for using AFA in connection with the downstream sales at issue (see Comment 17). Moreover, TPCO maintains that it is unfair to “cherry pick” from its U.S. sales data by analyzing targeted dumping using its sales to a U.S. customer with whom it is supposedly affiliated, but excluding those same sales from the dumping calculations.
- TPCO contends that Petitioners’ argument for using the P/2 test ignores the fact that the Department has specifically rejected the P/2 test in favor of the Nails Test stating that “{t}he P/2 test relies on a single, bright-line price threshold of two percent to define targeted dumping that does not account for price variations specific to the market in question.”<sup>294</sup>

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<sup>290</sup> See Certain Steel Nails from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008), and accompanying Issues and Decision Memorandum at Comment 8 (“Nails”).

<sup>291</sup> See Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea, 72 FR 60630 (Oct. 25, 2007).

<sup>292</sup> See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930 (Dec. 10, 2008).

<sup>293</sup> See OCTG from China at Comment 2.

<sup>294</sup> See Certain New Pneumatic Off-The-Road Tires from the People’s Republic of China: Final Affirmative

- Rather than using the P/2 test, TPCO submits that the Department's targeted dumping analysis should be based on a t-test which would recognize the importance of inherent price variations between sets of price data. TPCO claims that the t-test is statistically rigorous and flexible and can be used to capture differences in sample sizes and be adjusted to reflect different levels of confidence in the conclusions being drawn. Alternatively, TPCO urges the Department to alter its present targeted dumping methodology and determine that a value is different from the mean of a data set if it is more than two standard deviations from the mean.
- According to TPCO, Petitioners' request that the Department apply the average-to-transaction methodology to *all* of TPCO's sales ignores the statutory prohibition against using the average-to-transaction comparison when the average-to-average comparison accounts for all price differences and Congressional intent.<sup>295</sup> TPCO claims that the Department must first explain why price differences cannot be taken into account using the average-to-average comparison before it may use an average-to-transaction comparison. Moreover, TPCO maintains that the Department's longstanding practice is to use an average-to-transaction comparison only for those sales for which it has found targeted dumping.<sup>296</sup>
- TPCO opposes Petitioners' call for the use of zeroing when applying the average-to-transaction comparison where targeted dumping is found. TPCO claims that since the statute is silent on the use of zeroing, but the WTO Appellate Body has found zeroing violates the Anti-Dumping Agreement, the statute must be interpreted in a way that is consistent with the WTO Appellate Body's findings and not use zeroing with respect to targeted dumping.<sup>297</sup>

### **Department's Position:**

We agree with TPCO, in part. We have assigned a margin based on adverse facts available to a portion of TPCO's U.S. sales because of its failure to report the downstream sales of an affiliated U.S. customer.<sup>298</sup> Since TPCO's final dumping margin is already based, in part, on adverse inferences because of its reporting failure, there is no need to make adverse inferences in calculating the final dumping margin by presuming that targeted dumping occurred. When making adverse inferences in selecting from among the available information on the record, the Department's goal is to select information that is sufficiently adverse to induce future

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Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 404485 (July 15, 2008), and accompanying Issues and Decision Memorandum at Comment 23 C; OCTG from China at Comment 2.

<sup>295</sup> See 777A (d)(1)(B)(ii) of the Act; SAA at 842.

<sup>296</sup> See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 404485 (July 15, 2008), and accompanying Issues and Decision Memorandum at Comment 23 F.

<sup>297</sup> See Alleghany Ludlum Corp. v. United States, 367 F.3d 1339, 1348 (Fed. Cir. 2004).

<sup>298</sup> See Comment 17.

cooperation on the part of the respondent.<sup>299</sup> Here, we have determined that basing TPCO's dumping margin, in part, on the highest control number-specific dumping margin calculated for TPCO, is consistent with that purpose.

Additionally, we have not conducted our targeted dumping analysis using either the P/2 test or a t-test, nor have we altered the Nails Test by evaluating price differences using a two-standard deviation test. As in the Preliminary Determination, we have used the Nails Test to determine whether targeted dumping exists. The Department previously addressed each of these issues in OCTG from China. In that case, the Department stated that "the P/2 test collapses the pattern and significant difference requirements, which are analyzed separately under our new methodology {the Nails Test}. In doing so, the P/2 test may find targeted dumping in many cases when arguable no such dumping is occurring."<sup>300</sup> Further, the Department rejected the t-test noting that:

while the t-test identifies whether the difference in sample means is statistically different from zero, it does not say anything about whether the difference in sample means is significant. As a result, a t-test does not produce results that satisfy the statutory requirement that {the Department identify} prices that differ significantly across purchasers, regions, or time periods.<sup>301</sup>

Lastly, the Department has determined not to use a two-standard deviation test in its targeted dumping analysis, consistent with its finding that "the number of sales with prices that are two standard deviations below the average market prices is too restrictive a standard because it would likely only identify outliers in the observed price data and not identify a pattern of targeted prices."<sup>302</sup> In OCTG from China, the Department also noted that a single standard deviation analysis was reasonable because:

(1) it is a distinguishing measure relative to the spread or dispersion of prices in the market in question, and (2) it strikes a balance between two extremes, the first being where any price below the average price is sufficient to distinguish the alleged target from others, and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others.<sup>303</sup>

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<sup>299</sup> See Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part, 75 FR 50992 (August 18, 2010), and accompanying Issues and Decision Memorandum at Comment 31 (noting that the Department found the AFA rate used "sufficiently adverse to encourage cooperation and thereby effectuate the purpose of AFA.").

<sup>300</sup> See OCTG from China, and accompanying Issues and Decision Memorandum at Comment 2 (quoting Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 404485 (July 15, 2008)).

<sup>301</sup> See OCTG from China at Comment 2.

<sup>302</sup> See Id.

<sup>303</sup> See Id.

In addition, the use of the Nails test was recently affirmed by the CIT.<sup>304</sup> We have not addressed Petitioners' request to apply the average-to-transaction methodology to all of TPCO's sales, with zeroing, after finding targeted dumping because we have not presumed targeted dumping, as partial AFA. In addition, using the Nails test, we have not found targeted dumping for TPCO.

#### **Comment 19: Whether Market Economy Purchase Prices Should be Used to Value Steel Scrap**

- Petitioners claim that the Department found at verification that TPCO did not obtain more than 33 percent of its steel scrap from market economy sources and the Department should use WTA data for imports into India to calculate a SV for scrap.
- Petitioners argue that, in constructing the ratio of market economy purchase to the total purchase (MEP ratio) of steel scrap, TPCO used two different sets of accounting records and caused a disconnect between the numerator and denominator.
- Petitioners argue that TPCO failed to include a significant number of market economy purchases (MEP) in the denominator that were included in the numerator, thereby inflating its scrap MEP percentage above the 33 percent threshold.
- TPCO argues that TPCO's MEP of steel scrap was fully verified as reported.
- TPCO argues that the reporting methodology is consistent with Department's practice and was accepted in the recently completed investigation of OCTG from China, and the Department did not identify any deficiency with the reporting methodology until after the verification.
- TPCO argues that the difference in the two sets of accounting records regarding imported steel scrap in the numerator and denominator of the 33 percent threshold is caused by time lag between when TPCO International makes the purchase, received the goods, and then sells the goods to the ultimate customer, either TPCO or TPCO Iron.
- TPCO argues that purchases made by TPCO International were in fact traced to TPCO Group's sub-ledgers of imported purchases.
- TPCO proposes that even if the Department uses the "imported steel scrap" from the TPCO Group's sub-ledgers of imported purchases in both the numerator and denominator of the ratio, the threshold for using market economy price for all steel scrap is exceeded.
- TPCO argues that if the Department uses the amount of steel scrap purchased by TPCO in both numerator and denominator, the entire amount of "imported steel scrap" from TPCO Group's sub-ledger must be taken out of the denominator. This is to avoid double counting of market economy purchases in the denominator.

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<sup>304</sup> See Mid Continent Nail Corp. v. United States, 2010 Ct. Intl. Trade LEXIS 47 (May 4, 2010).

- TPCO claims that the Department's method of adjusting the denominator of the MEP ratio by removing the quantity sourced directly from TPCO International is not enough to reduce the double counting because the entire amount of "imported steel scrap" reported in the TPCO Group's sub-ledgers is a double counting of the MEP made by TPCO International.

### Department's Position:

The Department agrees with Petitioners that in constructing the MEP ratio, TPCO used two different sets of accounting records and caused a disconnect between the numerator and denominator. A correct construction of the ratio must use the same MEP in both the numerator and denominator. The Department is correcting TPCO's construction, taking into account any double counting of MEP in the denominator. The corrected construction shows that TPCO did not obtain more than 33 percent of its steel scrap from market economy sources, therefore the Department is using the steel scrap value based on the WTA data for imports into India as the SV for TPCO's domestically purchased steel scrap.<sup>305</sup> The Department's construction of the MEP ratio is the following.

$$\text{MEP Ratio} = c / (a + b + c - d)$$

- (a) : domestic steel scrap purchased by TPCO Group
- (b) : steel scrap of foreign source purchased by TPCO Group from domestic suppliers and paid in RMB
- (c) : steel scrap purchased by TPCO International from market economy suppliers and paid in market economy currency
- (d) : steel scrap purchased by TPCO Group directly from TPCO International

TPCO's reported MEP ratio is the following.

$$\text{MEP Ratio} = c / (a + b)$$

As an initial matter, the Department believes that total purchase by definition consists of domestic purchases and MEP. Therefore, a correct construction of the MEP ratio must have the identical MEP in both the numerator and denominator of the ratio – they cannot be numerically different. Any construction reflecting two different sets of MEP in the same ratio is not a valid measurement of the portion of MEP in relation to the total purchases by the same entity. The construction proposed by TPCO resulted in measuring MEP at two different points in the same entity – TPCO International and TPCO Group. TPCO stated clearly that as far as MEP is concerned, TPCO International is the sole purchaser of international materials.<sup>306</sup> Second, the correct amount of MEP for TPCO is reflected by the amount purchased by TPCO International (in market economy currencies) instead of by TPCO Group. What TPCO Group purchased as

<sup>305</sup> Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments, 71 FR 61716 (October 19, 2006); see also Comment 30.

<sup>306</sup> See TPCO's Supplemental Section D Questionnaire Response dated February 2, 2010 at SD-23



reflected by its sub-ledger for “imported steel scrap” are purchases from domestic entities and paid in RMB. In fact, whether these are steel scrap from “foreign sources” is irrelevant because the suppliers are domestic entities who took title to these steel scrap and offered them for sale to another domestic entity, affiliated or not, as a domestic transaction paid in RMB. The Department’s practice regarding MEP clearly establishes the requirements of both purchase from a market economy supplier and the payment for the purchase in market economy currency.<sup>307</sup>

The Department is concerned about double counting the same purchases in the denominator as both a MEP reported by TPCO International and an internal transfer to TPCO Group. This is the reason that the Department deducted from the latter the amount of steel scrap directly purchased by TPCO Group from TPCO International.

The Department agrees with TPCO that the MEP at TPCO International were fully verified as transactions that were sourced from market-economy suppliers and purchased in a market-economy currency. However, this fact is not relevant to the issue at hand – how to use the MEP in the construction of the MEP ratio. TPCO’s argument regarding the same MEP construction used in the recently completed OCTG from China investigation is also not relevant since materials in that investigation are not on the record of this investigation. Also, even if the materials were similar between the two investigations, two independent and separate verifications were conducted. At the verification of this investigation, the Department noted that TPCO Group’s entries in its sub-ledger for “imported steel scrap” are purchases of foreign sourced steel scrap from domestic entities and paid in RMB. TPCO reported to the Department that all the MEP were purchased by TPCO International and then sold or transferred to TPCO Group and TPCO Iron, occasionally through affiliated suppliers.<sup>308</sup>

TPCO argues that the difference in the two sets of accounting records regarding imported steel scrap (TPCO Group’s purchases of foreign sourced material and TPCO International’s MEP) is caused by a time lag between when TPCO International makes the purchase, receives the goods, and then sells it to the ultimate customer, either TPCO or TPCO Iron. The fact is that at verification, TPCO could not trace the TPCO Group’s purchases of foreign sourced steel scrap to the MEP made by TPCO International. There are several domestic suppliers of foreign sourced steel scrap in TPCO’s sub-ledger of imported purchases. See Verification Exhibit 6. Although TPCO claims that all these sales were ultimately from TPCO International, TPCO did not provide information that showed how each of the indirect purchases was originally part of the reported MEP of TPCO International. Therefore, although the Department verified that certain of the MEP of TPCO International were transferred to TPCO Group, it could not verify that all of the foreign sourced purchases made by TPCO Group are from the same MEP by TPCO International.

Other than the direct sales from TPCO International, all the other indirect sales have not been established as steel scrap originally bought by TPCO International as MEP. Even if all these

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<sup>307</sup> See 19 CFR 351.408(c)(1); Certain New Pneumatic Off-The-Road Tires from the People’s Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008), and accompanying Issues and Decision Memorandum at Comment 35.

<sup>308</sup> See TPCO’s Supplemental Section D Questionnaire Response dated February 2, 2010 at SD-22

purchases in the sub-ledger can be traced back to TPCO International, the Department would still have to conclude that these domestic transactions can be considered as MEP. The fact remains that a domestic distributor, whether affiliated or not with TPCO, purchased the MEP from TPCO International and rendered some services before selling them to TPCO Group. However, TPCO did not provide the Department with details regarding these transactions; TPCO informed the Department that: “In the ordinary course of business, TPCO International purchases market economy inputs, then sells them to TPCO Group.”<sup>309</sup> TPCO then noted in a footnote that: “On occasion, some of the purchases of steel scrap are first transferred through an additional affiliated trading company...”<sup>310</sup> TPCO clearly indicated that the indirect sales were: (1) “occasional,” and not in the ordinary course of business, and (2) “transfers,” unlike the sales from TPCO International to TPCO Group. TPCO Group’s sub-ledger of purchased imported steel scrap indicated that the indirect sales were more than “occasional.” The sub-ledger showed two suppliers in addition to TPCO International. In fact, the direct purchases from TPCO International only accounted for a small portion of all the purchases of imported steel scrap made by TPCO Group. Furthermore, these indirect sales were not transfers. They were domestic sales transactions paid in RMB.

Therefore, for this final determination, the Department corrected TPCO’s MEP ratio by first using the MEP by TPCO International in both the numerator and denominator so that the numerical value for MEP is identical in both parts of the ratio. Second, as for domestic purchases, the Department included all steel scrap purchases made by TPCO Group, whether they were imported or not, since these steel scrap were purchased from Chinese distributors in RMB. However, since the sales between TPCO International and TPCO Group have been verified, the Department deducted these sales from the denominator which represents the total purchase of steel scrap by TPCO. The resulting MEP ratio is less than 33 percent.

#### **Comment 20: Whether to Disallow a By-Product Offset for Steel Scrap**

- Petitioners claim that the Department should deny TPCO’s by-product offset for steel scrap because TPCO did not report the FOP for further processing steel scrap, even though the Department, in its January 14, 2010, supplemental questionnaire, requested that TPCO report such factors.<sup>311</sup> To support their claim, Petitioners cite to Mushrooms from China,<sup>312</sup> in which the Department states that it may deny offsets where the by-product is further processed and the factors related to the processing have not been provided.
- Moreover, Petitioners argue that in OCTG from China, the Department refused to grant TPCO a byproduct offset for steel scrap that underwent further processing prior to

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<sup>309</sup> Id. at SD-23.

<sup>310</sup> Id.

<sup>311</sup> See Supplemental Section D Response at SD-33, dated February 2, 2010 (Public Version).

<sup>312</sup> See Certain Preserved Mushrooms from the People’s Republic of China, 70 Fed. Reg. 42034, 42037 (Dep’t Commerce July 21, 2005) (prelim. results) (“Mushrooms from China”) (emphasis added), unchanged in final results, 70 Fed. Reg. 60789 (Dep’t Commerce Oct. 19, 2005) (final results).

reintroduction.<sup>313</sup> According to Petitioners, TPCO was clearly on notice in this investigation that these data must be reported. However, Petitioners contend that the deduction to the byproduct offset in OCTG from China was apparently inadequate to induce TPCO to provide the FOP for reprocessed scrap in the instant investigation. Accordingly, Petitioners argue that the Department should deny the entire scrap byproduct offset claimed by TPCO in order to provide a real inducement for TPCO to provide such data in the future, as the Department cannot allow TPCO to repeatedly refuse to provide these data.

- TPCO argues that the Petitioners' reading of Mushrooms from China is incorrect in that the Department denied the respondent's by-product offset because the respondent failed to show that the post-production scrap in question was in fact sold or reused, which is not the case for TPCO.<sup>314</sup> TPCO asserts that in its original Section D questionnaire response, TPCO provided information regarding its reintroduction of steel scrap into the production process, and the Department verified this information. TPCO states that although the Department requested information regarding the further processing of its scrap, the Department expressed no dissatisfaction when TPCO did not provide the information and claimed the data was immaterial. Therefore, the Department cannot now decide not to grant TPCO's by-product offset request.
- TPCO argues that denial of the by-product offset now would be tantamount to applying AFA, and the Department may only resort to FA when it has given the respondent adequate opportunities to supply the requested information and the respondent repeatedly fails to do so. TPCO maintains that no such pattern exists here, and argues that the Department should continue to allow TPCO's by product offset for steel scrap in its entirety for the final determination. According to TPCO, after February 2, 2010, the Department did not further question TPCO on this issue, nor did the Department ever investigate this issue further in supplemental questionnaires or at verification.
- TPCO further argues that if the Department determines to disallow some of the byproduct offset claimed by TPCO for steel scrap, the Department should only reduce the claimed byproduct offset only by the amount of steel scrap that underwent further processing.

#### **Department's Position:**

The Department has determined to grant TPCO a by-product offset for the steel scrap it reported that did not require further processing.<sup>315</sup> However, we have further determined to deny a by-product offset for the steel scrap that required further processing, but for which TPCO did not report the FOP for further processing. In the Department's initial questionnaire, we instructed TPCO to report material inputs used in the further processing of any claimed byproducts offsets.

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<sup>313</sup> Issues and Decision Memorandum in OCTG from China at Comment 17. Specifically, the Department calculated the percentage of the scrap that TPCO produced that was reprocessed and then reduced the scrap offset by this percentage.

<sup>314</sup> See Mushrooms from China at 42037.

<sup>315</sup> See TPCO Supplemental Section D submission, dated February 2, 2010, at SD-32 and SD-33.

Moreover, in the Department's January 14, 2010, supplemental section D questionnaire to TPCO, we reiterated this request, directing TPCO to "... report the FOP associated with the processing. . ." of the byproduct for steel scrap. In response to the Department's request for information, TPCO stated that a certain amount of its steel scrap by-product underwent further processing before being re-introduced into production.<sup>316</sup> However, TPCO failed to provide the factors and quantities used in the further processing, as requested. These factor quantities are necessary because simply providing a byproduct offset without accounting for the additional costs incurred before the byproduct can be reintroduced into production, does not accurately reflect the impact that the reintroduced byproduct has on total costs. We agree with Petitioners' citation to Mushrooms from China for the proposition that the Department will deny a request for a by-product offset if the party requesting a by-product offset does not report the FOP required for reintroduction to production. We do not agree with TPCO's assertion that the sole reason the Department denied the by-product offset in Mushrooms from China was because the respondent failed to show the scrap in question was sold or re-used. Mushrooms from China clearly states that the by-product offset was denied both because the respondent did "not provide evidence that post-production copper wire scrap was sold or re-used" and "did not provide either the complete set of factors necessary for the reworking of the scrap copper wire into a useable form, nor did it provide an attempt at a valuation for such factors."<sup>317</sup>

We disagree with TPCO's statements implying that it provided sufficient information regarding its reintroduction of steel scrap, and its claim that the Department was lax in questioning TPCO further on this issue. TPCO did not provide sufficient information regarding its re-introduction of steel scrap in its response to the Department's Antidumping Questionnaire, dated November 6, 2009. Accordingly, as noted above, in a supplemental questionnaire the Department requested that TPCO provide additional information regarding the introduction of steel scrap. This shows that the Department did not believe that TPCO had provided all the necessary information regarding the byproduct offset, and that the Department was questioning aspects of this by-product offset. Moreover, it is worth noting that TPCO made a similar argument in OCTG from China, to which the Department responded stating that:

TPCO's statement is tantamount to an assertion that it is the Department's responsibility to track down every incomplete answer provided by respondents and provide limitless opportunities for them to respond. If such were the case, the Department would never be able to complete an investigation or administrative review within the proscribed statutory deadlines. In this case, the Department requested this information twice from TPCO.<sup>318</sup>

We further disagree with TPCO's assertions that the Department cannot deny TPCO's request for a by-product offset because it would be tantamount to applying FA to TPCO, and the Department cannot apply FA unless "it has given a respondent adequate opportunities to supply the requested information and the respondent repeatedly fails to comply ..." TPCO also made

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<sup>316</sup> Id.

<sup>317</sup> Id.

<sup>318</sup> See OCTG from China at Comment 17.

the same argument in OCTG from China. Here, we reiterate the Department's statement in OCTG from China, that

. . . we consider the Original Questionnaire and the supplemental questionnaire adequate opportunity for TPCO to supply the requested information. Further, it is established Departmental practice that the interested party that is in possession of the relevant information has the burden of establishing the amount and nature of a particular adjustment to NV. See 19 CFR 351.401(b) and *Carrier Bags/PRC 3/17/08* IDM at Comment 7. Accordingly, unlike other situations referred to by TPCO, where, as here, the respondent is requesting a by-product offset and it is in control of the relevant information, the burden to provide information related to a request for a by-product offset is on the respondent.<sup>319</sup> Accordingly, TPCO's failure to provide the requested information means that TPCO did not meet its burden to demonstrate eligibility for a by-product offset for the steel scrap which required further processing for re-introduction to production.

For the reasons indicated above, and consistent with OCTG from China, the Department has determined to deny a by-product offset for the steel scrap that required further processing, but for which TPCO failed to report the FOP for further processing.

#### **Comment 21: Calculating Freight Expenses for Transporting Pipe for Further Processing**

- Petitioners maintain that TPCO conducted further processing of the subject merchandise at an affiliated processor, Yuantong Pipe Goods Co., Ltd. ("Yuantong Pipe") to which TPCO delivered semi-finished seamless pipe by truck, as indicated in TPCO's response. Petitioners argue that the Department should calculate a SV for the freight involving the shipment of semi-finished seamless pipe to Yuantong Pipe for further processing, as part of TPCO's cost of production, pursuant to its practice of treating freight expenses as a cost of production.<sup>320</sup>
- TPCO asserts that assessing additional inter-company freight expenses for all observations would be inaccurate and inconsistent with the Department's obligation to calculate accurate margins. TPCO maintains that not all of the subject merchandise produced by TPCO was processed at Yuantong Pipe. Accordingly, TPCO argues that assessing freight on all models of the subject merchandise would be inaccurate in that not all models incurred such freight costs.

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<sup>319</sup> See Certain Preserved Mushrooms from the People's Republic of China: Preliminary Results of the Eighth New Shipper Review, 71 FR 42034, 42037 (July 21, 2005); see also Frontseating Service Valves From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances, 74 FR 10886 (March 13, 2009) at Comment 10g.

<sup>320</sup> See Notice of Final Determination of Sales at Less than Fair Value: Certain Cold Rolled Carbon Steel Flat Products from Germany, 67 FR 62116 (Oct. 3, 2002) and Issues and Decision Memorandum at Comment 3 (Cold Rolled Steel from Germany).

- TPCO further argues that while the Department requested the distance from TPCO Group to Yuantong Pipe, and TPCO supplied the requested information on February 2, 2010, TPCO had no indication that the Department intended to calculate an additional expense using this distance. TPCO argues that the Department neither calculated such an expense in the Preliminary Determination nor in the recently completed OCTG investigation. See OCTG from China. Accordingly, TPCO argues that the Department should not assess freight expenses to Yuantong since assessing such costs without adequate time to comment or provide alternative methodology for calculating an accurate freight expense would be inappropriate.
- Alternatively, TPCO argues that if the Department decides to calculate a freight expense for the distance between TPCO and Yuantong Pipe, it should do so based on the ratio of the quantity of finished seamless pipe produced by Yuantong Pipe to the total production quantities produced by all of TPCO's facilities. Accordingly, TPCO proposed that the Department calculate such freight expenses by multiplying the distance from TPCO to Yuantong by the truck freight SV and the percentage of Yuantong Pipe's production quantity.
- In addition, TPCO requested that, in the event the Department decides to calculate such freight expenses, it should add such expenses to the NV and not calculate the expenses as a raw material expense because such freight was incurred at the finishing stage of production when certain products were transported to Yuantong Pipe.

#### **Department's Position:**

We agree in part with Petitioners and TPCO. While the Department, in its Preliminary Determination, did not calculate freight charges associated with the transportation of semi-finished pipes for further processing from the TPCO Group to Yuantong Pipe, we agree with Petitioners that such freight costs should be included in the Department's calculation of TPCO's cost of manufacturing. In Cold Rolled Steel from Germany, the Department treated certain freight costs associated with the transportation of products from the mill to the loading dock at the border, as an addition to the company's cost of manufacturing because such costs involved internal freight, which were incurred before the point of shipment of the subject merchandise. In that case, the Department also noted that movement expenses, as defined by section 773(a)(6)(B)(ii) of the Act, are transportation or warehousing expenses incurred by the seller after the merchandise leaves the point of shipment. In this case, the freight expenses incurred by TPCO are not related to the finished products. Rather, such freight costs involve the transportation of semi-finished pipes from TPCO's facility to its affiliated processor. Accordingly, consistent with the Department's practice, we have treated the transportation cost involving the transportation of semi-finished pipes, from TPCO to its affiliated processor, as part of the processing costs being employed by TPCO in producing the subject merchandise. See section 773(b)(3)(A). Specifically, the Department added the aforementioned cost to TPCO's cost of manufacturing for the final determination. For further details, see TPCO's Final Analysis Memo.

Moreover, while we agree that the Department did not request that TPCO report the distance from TPCO Group to Yuantong Pipe in the FOP database specifically for each model of seamless pipe that underwent further processing at Yuantong Pipe, the Department has requested and received information from TPCO on the record of this investigation regarding the distance and the mode of transportation.<sup>321</sup> Therefore, the information regarding the distance and the mode of transportation is on the record of this investigation, and, as indicated above, we have determined to use this to increase TPCO's cost of manufacturing. However, we do not have the product-specific freight charges associated with further processing those products which were further processed at Yuantong Pipe.

We agree with TPCO that freight charges should not be included for all subject merchandise, since the record indicates that only certain products were transported to Yuantong Pipe for further processing. Accordingly, because necessary information regarding the product-specific freight charges associated with further processing at Yuantong Pipe is not on the record, and the fact that not all of TPCO's seamless pipe products were further processed at Yuantong Pipe, as facts available, the Department has determined to use TPCO's proposed method of calculating such freight expenses, based on the ratio of the quantity of seamless pipe processed by Yuantong Pipe compared to the total quantity of seamless pipe produced. See section 776(a) (providing that the Department may resort to facts available when necessary information is not on the record). For further details, see TPCO's Analysis Memo.

#### **Comment 22: Whether Certain Materials are Inputs or Overhead**

- Petitioners maintain that TPCO classified certain inputs as overhead and has not provided usage rates for these items.<sup>322</sup> According to Petitioners, none of these inputs should be treated as overhead because they are either physically consumed in the production process or are regularly replaced. They maintain that, consistent with its normal practice, the Department should treat these materials as FOP, thereby, calculating unit factor costs for each of these items in its final determination.
- Petitioners argue that the Department's well-established practice, which includes cases involving steel products, is to treat inputs that serve a certain function as FOP rather than factory overhead.<sup>323</sup> Petitioners contend that the Department has previously recognized that these types of inputs are consumed in a certain phase of production.<sup>324</sup> Petitioners further contend that the Department confirmed at TPCO's verification that one of the

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<sup>321</sup> See the Department's supplemental Section D questionnaire, dated January 14, 2010. See, also, TPCO's supplemental Section D response, dated February 2, 2010, at SD-26.

<sup>322</sup> See Supplemental Section D Response at SD-33 (BPI Version).

<sup>323</sup> See, e.g., Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China: Final Results of the 2007-2008 Antidumping Administrative Review, 75 FR 8301 (Feb. 24, 2010) ("Steel Plate from China"); Notice of Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People's Republic of China, 62 FR 9160, 9169 (February 28, 1997) ("Brake Drums from China"); Notice of Final Determination of Sales at Less than Fair Value: Pure Magnesium in Granular from the People's Republic of China, 66 FR. 49345 (Sept. 27, 2001); Notice of Final Determination of Sales at Less than Fair Value: Silicon Metal from the Russian Federation, 68 FR 6885 (Feb. 11, 2003) (final results) ("Silicon Metal from Russia").

<sup>324</sup> See Brakes Drums from China, 62 FR 9160.

inputs in question was consumed.<sup>325</sup> Thus, Petitioners argue that since these inputs are consumed in the production process, they are properly treated as FOP.

- With respect to an additional input under consideration, Petitioners argue that the Department has determined how this input is used in production.<sup>326</sup> Therefore, Petitioners infer that this input is regularly replaced and, properly treated as a factor of production, as well. In support of their argument, Petitioners cite to the Department's recent determination in Steel Plate from China in which the Department found a certain input should be valued as a factor of production, rather than factory overhead.<sup>327</sup> Accordingly, Petitioners argue that there is no reason for the Department to characterize the input differently in this case.
- Petitioners assert that the Department treats an item as a factor of production if it is "consumed for the purpose of manufacturing subject merchandise."<sup>328</sup> They further maintain that the Department will also consider an item to be "consumed" if it is regularly replaced.<sup>329</sup> Moreover, Petitioners note that in order to determine whether an input should be treated as a factor of production or overhead, the Department also examines the significance of the input in the production process<sup>330</sup> and how the input is typically classified – i.e., as a material input or as overhead – by the industry.
- Petitioners argue that, while not dispositive, the Department takes into account how the input in question is classified by the respondent in its own books and records.<sup>331</sup>
- Petitioners claim that TPCO's own books and records confirm the fact that these inputs were physically consumed in the production of the subject merchandise or regularly replaced and, therefore, should be treated as FOP. According to Petitioners, TPCO's Monthly Cost Sheets, which were used by the company to calculate its usage rates, confirms that TPCO consumes one of the inputs in question in a certain phase of production.<sup>332</sup> Therefore, Petitioners argue that in light of the fact that TPCO calculates and tracks certain information regarding these inputs in the ordinary course of business, these inputs are physically consumed in the production process or regularly replaced.
- Furthermore, Petitioners note that in its books and records, TPCO also distinguishes the inputs in question in a way that indicates they are not overhead items. Petitioners

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<sup>325</sup> See FOP Verification Report at 19 (BPI Version).

<sup>326</sup> See Silicon Metal from Russia.

<sup>327</sup> See Steel Plate from China.

<sup>328</sup> See Steel Rod from China at Comment 2.

<sup>329</sup> See Steel Wire Garment Hangers from the People's Republic of China, 73 FR 47587 (August 14, 2008) at Comment 9D.

<sup>330</sup> See Glycine from the People's Republic of China: Final Results of New Shipper Administrative Review, 66 FR 8383 (January 31, 2001) at Comment 3 (classifying significant items as FOPs and insignificant items as overhead).

<sup>331</sup> While not dispositive, the Department takes into account how the input in question is classified by the respondent in its own books and records. Issues and Decision Memorandum in Silicon Metal from China at Comment 12.

<sup>332</sup> See Section D Response at Ex. D-5(a).



maintain that while TPCO reports to the Department that such items are overhead, its books and records and the manner in which these input are tracked in the books, are not consistent with that claim.<sup>333</sup>

- Petitioners argue that TPCO's own records indicate that the items at issue are significant in the production of the subject merchandise in terms of consuming or replacing these items regularly.
- Lastly, Petitioners maintain that publicly available information from the American Iron and Steel Institute ("AISI") shows that the items in question are either physically consumed or regularly replaced. They note that, according to AISI, the inputs<sup>334</sup> are all consumed in steel making.<sup>335</sup> Petitioners also proposed FOP calculations for these items.<sup>336</sup>
- TPCO argues that the Department should reject Petitioners' arguments and continue to classify the inputs in question as overhead because there is no basis for the Department to reject TPCO's classifications of these items, and there is no means to correctly assign a value to these items other than as manufacturing overhead. In support of its argument, TPCO states that the Department verified the accuracy of TPCO's reported data, including ancillary overhead, and noted that the items at issue were considered by TPCO to be overhead; not raw materials used in TPCO's production process. Moreover, TPCO asserts, contrary to Petitioners' argument, that it properly calculated the material inputs used at each stage of production, and argues that any attempt to calculate an FOP for these items would be inaccurate, as TPCO calculated detailed, product specific FOPs for all CONNUMs in the FOP database based on the yield for each stage of production.
- TPCO argues that, if the Department determines to value these materials as direct materials, it should not use the calculation method proposed by Petitioners.

### **Department's Position:**

For the final determination, the Department will continue to consider the materials in question as overhead items rather than direct FOP. This is consistent with the Department's determination in OCTG from China, in which the Department valued such materials as overhead, as well as the Department's determination in Silicon Metal from China, where we valued materials which were not physically incorporated into subject merchandise as overhead.<sup>337</sup> In its supplemental Section D questionnaire response, TPCO stated that these auxiliary materials were not direct materials because they were not incorporated into subject merchandise.<sup>338</sup> Moreover, during TPCO's

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<sup>333</sup> See Id.

<sup>334</sup> Petitioners' Submission of New Factual Information at Ex. 43, 2; Ex. 44, 1, Ex. 45, 2 and 6 (Public Document).

<sup>335</sup> See Id. at Ex. 43, 2.

<sup>336</sup> See Exhibits 2 through 5 attached to Petitioners' case brief.

<sup>337</sup> See OCTG from China at Comment 18; Silicon Metal from China at Comment 12.

<sup>338</sup> See TPCO's February 2, 2010, supplemental Section D questionnaire response at SD-33 and SD-34, and Exhibit SD-7.

verification, we noted that TPCO officials consistently recorded the materials at issue that we examined as “Ancillary Materials” through voucher entries, and that the material at issue, such as “[\*\*\*]” was used in the smelting stage. . . .<sup>339</sup> Furthermore, in OCTG from China, the Department stated the following with respect to TPCO’s overhead items:

“ . . . materials classified by TPCO as ancillary materials were used to “line the trough at the base of the furnace,” as an “insulation agent,” as “plugs,” as “protectant materials,” to “conduct electricity,” as “liner/insulation,” to “remove impurities,” to “absorb oxygen,” to “prevent oxidization,” “to remove impurities,” and as lubrication, *etc.* Further, at page 22 of TPCO’s SDQR 10/6/09 TPCO states that consistent with its own accounting standards it calculates cost of production using the cost of direct materials and the cost of materials not classified as direct materials, “such as tools (*e.g.*, mandrils, push rod heads), insulation (*e.g.*, Insulation agent, fire retardant materials), and other materials used in the production process, rather than the production of the material. TPCO tracks these materials separately in its monthly cost sheets. The Department found no information at verification to contradict TPCO’s described use and classification of these materials.”<sup>340</sup>

As in OCTG from China, the Department found no information at verification to contradict TPCO’s described use and classification of the items at issue. Furthermore, TPCO has not submitted per unit consumption data with respect to the aforementioned items, and the Department has not requested that it do so. Therefore, consistent with OCTG from China, the Department has continued to treat the inputs in question as overhead items for purposes of the final determination.

The Department recognizes that, in Brake Drums from China, the Department valued certain materials as a direct material, stating that it is “consumed during the smelting process as flux.”<sup>341</sup> However, as stated above, we have determined in this case, and in OCTG from China, that it is appropriate to value these materials as factory overhead because they are not direct materials in the production of subject merchandise. Further, as discussed below, we are treating Hengyang’s and TPCO’s ancillary materials in a similar manner.<sup>342</sup> Therefore, we have continued to value these materials as factory overhead, rather than as direct materials.

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<sup>339</sup> See TPCO’s Verification Report at 19 and Exhibit 22.

<sup>340</sup> See OCTG from China at Comment 18.

<sup>341</sup> See Brakes Drums from China at Comment 8.

<sup>342</sup> See Comment 38.

## Comment 23: Whether to Deduct Domestic Inland Insurance from the U.S. Price

- Petitioners argue that the Department should calculate a SV for domestic inland insurance incurred by TPCO in China, and deduct the SV for domestic inland insurance from the U.S. price in the final determination.<sup>343</sup>
- Petitioners state that TPCO did not report domestic inland insurance on the grounds that its marine insurance includes a “warehouse-to-warehouse” clause, which covers the risk of domestic inland shipment in China.<sup>344</sup> However, Petitioners assert that the Department’s normal practice is to deduct domestic inland insurance from the U.S. price when it is incurred.<sup>345</sup> Petitioners argue that the Department deducted domestic inland insurance from TPCO’s U.S. price in OCTG from China under the same circumstances as those present in this instant investigation.<sup>346</sup> Petitioners argue that here, as in OCTG from China, TPCO incurred domestic inland insurance expenses as evidenced by the fact that its marine insurance contained a warehouse-to-warehouse clause; and, as in OCTG from China, TPCO’s marine insurance provider, which also supplied the domestic inland insurance, was a NME vendor.<sup>347</sup> Accordingly, Petitioners argue that the Department should deduct domestic inland insurance from the U.S. price, based on Petitioners’ proposed SV for domestic inland insurance.<sup>348</sup>
- Moreover, Petitioners argue that contrary to TPCO’s allegation in its questionnaire response, a deduction for domestic inland insurance would not result in double-counting. Petitioners argue that it is irrelevant that TPCO’s NME insurance company bundles marine insurance with domestic inland insurance, because the SV for marine insurance used by the Department does not include domestic inland insurance.<sup>349</sup> Petitioners assert that TPCO’s double-counting argument was explicitly rejected by the Department in OCTG from China.<sup>350</sup>
- TPCO argues that the Department’s regulations require that adjustments to price be made for expenses that relate to the sale, and that TPCO did not incur domestic inland insurance expense related to sales of subject merchandise, therefore the Department should not make an adjustment for domestic inland insurance.<sup>351</sup> TPCO argues that the Department’s verifications of TPCO in China and the United States did not result in a finding of unreported expenses. Accordingly, TPCO argues that the Department has no basis to impute an expense for inland insurance that was not incurred by TPCO.

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<sup>343</sup> See Surrogate Values Memo at Attachment 2 (Public Document).

<sup>344</sup> See TPCO’s Response to Section C of the Department’s Questionnaire (Dec. 23, 2009) (“Section C Response”) at 22 (Public Version).

<sup>345</sup> See, e.g., Prestressed Concrete Steel Wire Strand From the People’s Republic of China: Preliminary Determination of Sales at Less Than Fair Value, 74 FR 68232, 68238 (Dec. 23, 2009).

<sup>346</sup> See OCTG from China at Comment 3.

<sup>347</sup> See TPCO’s Section C Response at 25 (Public Version).

<sup>348</sup> See Exhibit 57, Figure 1 to Petitioners’ Submission of New Factual Information, dated March 26, 2010.

<sup>349</sup> Id.; See also Petitioners’ Surrogate Value Submission at Ex. B (Public Document).

<sup>350</sup> See OCTG from China at Comment 3.

<sup>351</sup> See 19 CFR §351.402(b).

## Department's Position:

For the final determination, the Department has revised TPCO's net U.S. price calculation by deducting domestic inland insurance from the gross unit price as part of domestic movement expenses. In the Preliminary Determination, the Department did not deduct domestic inland insurance expense from TPCO's U.S. gross unit price. However, notwithstanding its claims that it did not incur this expense, we note that TPCO stated that its marine insurance includes a "warehouse-to-warehouse" clause, which covers the risk of domestic inland shipment.<sup>352</sup>

TPCO's response acknowledges that TPCO's NME marine insurance covered inland insurance as well. We determine that, as in OCTG from China, TPCO incurred domestic inland insurance for subject merchandise. In OCTG from China, the Department stated that

"... because the SV for marine insurance does not include domestic inland insurance, it is irrelevant that TPCO's NME marine insurance provider bundles inland and marine insurance in one package. This fact would be relevant if we were considering the price TPCO paid to the provider; however, because TPCO's marine insurance is from an NME supplier, we are valuing this expense using an SV."<sup>353</sup>

As in OCTG from China, in this case, while TPCO's marine insurance covers domestic inland insurance, the SV for marine insurance used by the Department does not include domestic inland insurance provided by an NME supplier. We find no merit in TPCO's argument that, because the Department's verification did not result in a finding of unreported expenses, the Department has no basis to impute an expense for inland insurance that was not incurred by TPCO. As the record evidence clearly shows that TPCO's marine insurance covers domestic inland insurance, the question at issue is whether TPCO's expense for domestic inland insurance is captured in the SV used for marine insurance. Since the SV for marine insurance does not cover domestic inland insurance, an additional SV for domestic inland insurance had to be used to account for such an expense. Accordingly, consistent with OCTG from China, we are valuing this expense, using a SV for domestic inland insurance, as an adjustment to TPCO's reported U.S. price. Specifically, we valued TPCO's domestic inland insurance, using an Indian domestic inland insurance value derived from Exhibit 57, Figure 1 to Petitioners' Submission of New Factual Information, dated March 26, 2010. For the final determination, we have revised TPCO's net U.S. price calculation by deducting domestic inland insurance from the gross unit price as part of domestic movement expenses.<sup>354</sup>

## Comment 24: Whether to Correct the Conversion Factor for Argon

- Petitioners argue that in its Preliminary Determination, the Department incorrectly multiplied the unit value of argon in U.S. dollars per kilogram ("kg") by the conversion

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<sup>352</sup> See TPCO's section C questionnaire response, at C-22, dated December 24, 2009.

<sup>353</sup> See OCTG from China at Comment 3.

<sup>354</sup> See TPCO's Analysis Memorandum for the Final Determination, dated concurrently with this memorandum ("Final Analysis Memo").

factor of kg per cubic meter to arrive at a SV in U.S. dollars per cubic meter. According to Petitioners, the Department should first convert the quantity of gas reported by the WTA from kilograms to cubic meters by multiplying the total quantity by the corresponding conversion factor. The per-unit value should then be calculated by dividing the total U.S. dollar value reported by the WTA by the number of cubic meters, or by dividing the value in U.S. dollars per kg by the conversion factor.

No other parties commented on this issue.

### **Department's Position:**

We agree with Petitioners. In the Preliminary Determination, the Department inadvertently applied the conversion factor for argon incorrectly. For the final determination, the Department has corrected the calculation of the SV for argon by dividing the WTA total value in U.S. dollars by the total quantity of argon converted to cubic meters, and multiplying the resulting SV per-cubic meter to the reported factors for argon in cubic meter. For further details, see TPCO's Final Analysis Memo.

### **Comment 25: Whether to Calculate a Factor for Pipeline Transmission**

- Petitioners argue that a number of FOP were transported via pipeline to TPCO's facilities, and that the Department should calculate a cost for pipeline transmission and apply it to all FOP transported to TPCO's production facilities via pipeline.
- Petitioners propose that the Department use a SV for pipeline transmission that was used by the Department in OCTG from China,<sup>355</sup> and attached as Exhibit J to Petitioners' Final Submission of Surrogate Value Data.
- Petitioners argue that the Department should not accept TPCO's assertion that it did not incur transportation costs for certain gases because it reported a delivery distance for such gases and stated that it would forgo the ability to make changes to its transportation distances. Petitioners assert that they "relied on TPCO's statement that it had 'forgone' its ability" to make changes to distance, and so neither the Department, nor Petitioners were able to meaningfully analyze the issue.<sup>356</sup> Therefore, the Department should use the distance for the gases at issue, which TPCO originally reported.
- TPCO refutes Petitioners' argument and asserts that the Department verified through reviewing contracts with its gas supplier, and other utility information that such gases and water were transmitted via pipelines, within its own facility. Accordingly, TPCO argues that there is no cost for the conveyance of these gases and water, and any cost arising

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<sup>355</sup> See Memorandum to the File from Sergio Balbontin re: Investigation of Certain Oil Country Tubular Goods from the People's Republic of China: Factor Valuations for the Final Determination (Apr. 8, 2009) at Attachment 4 (Public Document) (attached as Exhibit J, Attachment 1 to Petitioner's Final Surrogate Value Submission (Public Document)).

<sup>356</sup> See Petitioners' rebuttal brief at 19.

from such conveyance would be captured in the SV for factory overhead. TPCO also argues that because the pipelines are not owned by the supplier, it should not be assessed a cost for use of its own pipelines. Accordingly, TPCO contends that the Department should not apply a freight charge to the aforementioned gases and water inputs.

### **Department's Position:**

We agree with TPCO that the Department should not apply transmission costs to the gases transmitted to TPCO via pipelines within TPCO's own facilities. Moreover, we find that Petitioners' argument that the Department should apply transmission cost to gases transmitted via pipelines, as in OCTG from China, is misplaced. The transmission cost used in OCTG from China, to which Petitioners refer, is specifically related to the SV for natural gas, which reflected a separate charge for transmission costs. The Department found no evidence that TPCO incurs additional costs for use of these pipelines. Accordingly, the Department finds that pipeline transmission is not a FOP that should be valued separate and apart from the valuation of the FOP that were transmitted via pipeline. Moreover, we do not agree with Petitioners' argument that the Department should value the distance reported for gases, because, at verification, despite TPCO's erroneous reporting of distances for the gases at issue, the Department's verifiers confirmed that the gases used in the production of subject merchandise were transmitted via pipelines.<sup>357</sup> Accordingly, in the final determination, the Department neither applied transmission costs nor freight costs to the gases at issue.

### **Comment 26: Whether to Disallow a By-Product Offset for Electricity**

- Petitioners argue that TPCO's reported byproduct offset for electricity is unjustified and should be rejected by the Department. Petitioners state that in its Section D Response, TPCO claimed a byproduct offset for electricity on the grounds that it produced and sold electricity during the POI. According to Petitioners, TPCO also reported that it did not reintroduce electricity into its production process. Petitioners argue that during TPCO's verification, however, the Department found that TPCO did not produce, sell, or reintroduce electricity into its production process. Thus, Petitioners request that the Department deny TPCO's claim for byproduct offset for electricity.
- TPCO argues that the Department should continue to allow a byproduct offset for electricity. TPCO contends that while it is correct that steam, water and nitrogen are transferred from TPCO Iron, the affiliated entity that sold these inputs to Company X,<sup>358</sup> the valuation of such inputs in TPCO Iron's books and records was based on electricity. According to TPCO, TPCO Iron tracks the sales of steam, water and nitrogen as sales of electricity, as evidenced by the fact that those components were booked on the voucher for electricity, which was verified by the Department. Therefore, TPCO argues that since steam, water, and nitrogen are components of electricity, and they are treated as such in TPCO Iron's books based on the cost of electricity, and the Department verified that TPCO invoiced and received payment for these inputs, the Department should continue

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<sup>357</sup> See TPCO's Verification Report at Attachment 1 of Verification Exhibit 1.

<sup>358</sup> Company X is an affiliated entity of the TPCO Group. See TPCO's Verification Report at page 20.

to allow a byproduct offset for electricity and value these inputs as electricity.

### **Department's Position:**

We disagree with TPCO that a byproduct offset for electricity is warranted. In the Preliminary Determination, we granted TPCO a byproduct offset for electricity because it reported that it sold electricity.<sup>359</sup> However, during the Department's verification of TPCO, the Department did not find that TPCO produced or sold electricity to either an unaffiliated party or an affiliated party. The Department did find that TPCO sold steam, water and nitrogen to its affiliate, Company X. In its verification report, the Department stated that:

“... with respect to the claimed electricity byproduct, we found that the TPCO Group did not produce and sell electricity to an unaffiliated party. Rather, the TPCO Group sold steam, water and nitrogen to {Company X}.”<sup>360</sup>

In TPCO's Verification Report, the Department also referred to “Voucher for Electricity Sales,” which itemizes steam, water, and nitrogen sold to Company X and an invoice issued from the TPCO Group to Company X for the sales of nitrogen, steam and water.<sup>361</sup> Furthermore, the Department confirmed through TPCO Group officials that TPCO Group did not produce and sell electricity to Company X. See TPCO's Verification Report at page 20.

The Department finds that TPCO's argument with respect to a byproduct offset for electricity is not supported by record evidence. TPCO did not demonstrate that it sold electricity during the POI. Rather, the voucher and invoice discussed above indicated that steam, water and nitrogen were used by another party to produce electricity, not that electricity was sold to the other party. It is the Department's practice to grant a byproduct offset to a respondent's NV if the respondent can demonstrate that the byproduct is resold.<sup>362</sup> A by-product/co-product offset is only granted for merchandise that is either sold or reintroduced into production during the POI, and only up to the amount of that by-product/co-product actually produced during the POI.<sup>363</sup> As indicated above, the record evidence shows that TPCO did not sell electricity, nor did it reintroduce electricity into production during the POI. Inasmuch as offsets to steam and water had been correctly reported, the Department granted these offsets. Because TPCO did not claim an offset for nitrogen, no offset was granted. Accordingly, the Department did not grant TPCO a byproduct offset for electricity.

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<sup>359</sup> See TPCO SV Memo at 8.

<sup>360</sup> See TPCO's Verification Report at 20 and Verification Exhibit 24 (actual proprietary name of the company was replaced by “Company X”).

<sup>361</sup> Id.

<sup>362</sup> See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Ferrovandium from the People's Republic of China, 67 FR 71137 (Nov. 29, 2002), and accompanying Issues and Decision Memorandum at Comment 10.

<sup>363</sup> See the Department's Antidumping Questionnaire to TPCO in this instant investigation.

## Comment 27: Whether to Apply Partial AFA to Unreported Steel Strap

- Petitioners maintain that at verification, the Department found that “TPCO used steel strap to bind seamless pipe with diameters at or below 7 inches.”<sup>364</sup> Petitioners argue that because TPCO had not reported this packing FOP in the FOP database, the Department should use partial AFA to calculate a factor for steel strap in the FOP database. Petitioners argue that TPCO’s failure to report the data in question indicates that it failed to act to the best of its ability. As partial AFA, Petitioners argue that the Department should use a consumption quantity for steel strap equal to the highest factor for steel strap consumption reported by Hengyang, who, like TPCO, also used steel strap during the POI, and apply such a factor to all of TPCO’s CONNUMs.<sup>365</sup> Petitioners further argue that the Department should then multiply the aforementioned factor by the SV used by the Department in the Preliminary Determination for Hengyang’s steel strap to arrive at a unit cost for steel strap.<sup>366</sup>
- Petitioners state that if that the Department does not apply partial AFA for steel strap, it should apply, as neutral FA, Hengyang’s average usage rate for steel strap consumption.
- TPCO argues that the Department should not apply a FOP for steel strap for all sizes of pipe, as Petitioners requested, because TPCO only used steel strap for products at or below seven inches in diameter. TPCO argues that this is supported by the record, including the Department’s verification report. Therefore, TPCO argues that Department must not apply a steel strap SV for pipe of diameter greater than seven inches in its final determination.

### **Department’s Position:**

We agree with Petitioners that TPCO should have reported its consumption of this packing material. In the AD questionnaire, the Department requested that TPCO report all factors for packing materials that it used in packing the subject merchandise. Due to the fact that TPCO failed to report that it used steel strap as a packing material in response to the Department’s questionnaire, in the Preliminary Determination, the Department did not include a cost for steel strap in TPCO’s margin calculation. However, at verification, the Department found that TPCO used steel straps when packing seamless pipe.<sup>367</sup> TPCO officials indicated at that time that such strap was only used for seamless pipe with an outside diameter equal to or less than seven inches.<sup>368</sup> Because this factor is an expense which should be included in the Department’s calculations in the final determination, but TPCO failed to supply consumption information for this factor, necessary information is not on the record regarding the amount of steel strap consumed by TPCO.<sup>369</sup> Additionally, TPCO did not report this information by the deadlines

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<sup>364</sup> See TPCO’s Verification Report at 7-8.

<sup>365</sup> See Surrogate Value Memorandum at Attachment 1 (Public Document).

<sup>366</sup> Id.

<sup>367</sup> See TPCO’s Verification Report at 7.

<sup>368</sup> Id.

<sup>369</sup> See section 776(a)(1) of the Act.



provided for reporting such information (i.e., by the date on which the AD questionnaire was due).<sup>370</sup> Therefore, we have determined to use the facts otherwise available in making this calculation. In addition, the Department did not discover that TPCO had not reported this packing material until verification. Therefore, the Department has determined that TPCO failed to cooperate by not acting to the best of its ability to comply with the Department's request for information, and thus an adverse inference is warranted.<sup>371</sup> Accordingly, since the factor for steel strap is an expense which should have been included in TPCO's NV calculation, but TPCO failed to report the information on this factor and the failure was only discovered at verification, as an adverse inference, the Department relied on information placed on the record of this investigation in determining the cost for this packing material.<sup>372</sup> Specifically, the Department assigned the average of the three highest consumption rates for steel strap provided on the record of this investigation by Hengyang, the other mandatory respondent in this investigation, to all CONNUMs reported in TPCO's FOP database. No corroboration of this rate is necessary because the information we are relying on as partial AFA was obtained in the course of this investigation and is not secondary information.<sup>373</sup>

We disagree with TPCO that a consumption rate for steel strap should be limited only to pipe with an outside diameter at or below seven inches. While the Department noted that, in the finishing process, TPCO used steel strap to bind seamless pipes with diameters at or below seven inches, there is no clear evidence that the packing material was limited in use to seamless pipe within such a diameter range. Had TPCO provided the necessary information on the record in response to the Department's questionnaire, and reported its actual usage rates of steel strap in its FOP database on a CONNUM-specific basis, the Department would have ascertained, based on TPCO's production records, not just based on a mere observation during the Department's tour of TPCO's facility, whether steel strap usage is in fact limited to steel pipes with outside diameters at or below seven inches. Therefore, given TPCO's failure to provide the necessary information on the record that would substantiate its actual usage of steel strap on a CONNUM-specific basis, and our determination that TPCO failed to cooperate by not acting to the best of its ability, as an adverse inference, the Department applied the aforementioned factor for steel strap to all CONNUMs reported in TPCO's FOP database, for purposes of the final determination.<sup>374</sup> Moreover, as is the case with Hengyang's steel strap valuation, the Department valued the aforementioned factor for steel strap using WTA Indian import data under HTS 721.220.90.<sup>375</sup> For further details on our selection of this SV, see TPCO's Final Analysis Memorandum.

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<sup>370</sup> See section 776(a)(2)(B) of the Act.

<sup>371</sup> See section 776(b) of the Act.

<sup>372</sup> Id., see also section 776(b)(4) of the Act.

<sup>373</sup> "Secondary information" is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise. See SAA at 870.

<sup>374</sup> See TPCO's Final Analysis Memorandum, dated concurrently with this memorandum.

<sup>375</sup> Id.

## Comment 28: Whether to Deduct Warranty Expenses from the U.S. Price

- Petitioners assert that the Department's questionnaire instructed TPCO to provide a schedule of warranty expenses incurred for the subject merchandise for the three most recently completed fiscal years,<sup>376</sup> and calculate a warranty cost per unit for each fiscal year.<sup>377</sup> Petitioners argue that TPCO did not provide this information, because TPCO claimed that it did not have product claims for defective or damaged sales of subject merchandise sold during the POI.<sup>378</sup>
- Petitioners contend that, while TPCO reported that it did not incur warranty expenses during the POI,<sup>379</sup> the information collected by the Department during the verification of TPCO's affiliate, TEI, indicates that TPCO had incurred such expenses during the last three fiscal years. Petitioners argue that it is the Department's practice to collect POI-specific warranty expenses and warranty expenses for the three most recently completed fiscal years, and if the warranty expenses for the POI are not in line with the company's experience, it will deduct the average warranty expense for the three years from the respondent's U.S. price.<sup>380</sup> Accordingly, Petitioners request that the Department should deduct the three-year average warranty expense from the U.S. price for purposes of the final determination. In exhibit 6 of their case brief, Petitioners propose a calculation of a warranty expense ratio to be used in calculating the amount of warranty expenses to be deducted from U.S. price.
- TPCO argues that Petitioners' argument that TPCO's warranty expenses are out of line with historic experience is based on incorrect information and is contrary to record evidence. According to TPCO, the Department has fully verified that neither TPCO nor its U.S. affiliated reseller, TEI, incurred any warranty expenses on any subject merchandise during the POI.
- Moreover, TPCO asserts that the information collected by the Department during TEI's verification provide evidence that the warranty expenses, to which Petitioners refer in support of their allegation, were incurred outside the POI, pursuant to sales of non-subject merchandise, as indicated by the invoice number at the top of the credit memos.<sup>381</sup>
- Accordingly, TPCO argues that, contrary to Petitioners allegation, there are no grounds for finding that it has unreported warranty claims relating to the subject merchandise.

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<sup>376</sup> See Section C Response at 33 (Public Version).

<sup>377</sup> Id.

<sup>378</sup> Id.

<sup>379</sup> Id.

<sup>380</sup> See Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review, 74 FR 50774 (Oct. 1, 2009) at Comment 4; Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008) at Comment 69.

<sup>381</sup> See Exhibit 6-B of the Department's CEP Verification of TPCO's Responses.

## Department's Position:

We disagree with Petitioners. The warranty expenses to which Petitioners refer in support of their claim involve sales of non-subject merchandise. During its verification of TEI, the Department found no evidence that TPCO incurred warranty expenses during the POI with respect to the subject merchandise. The Department examined TEI's records for the three most recently completed fiscal years and after the POI to ascertain whether TPCO incurred warranty expenses relating to subject merchandise sales. However, the documentation examined and collected during TEI's verification provided evidence that the warranty expenses to which Petitioners referred were incurred pursuant to OCTG sales rather than sales of subject merchandise. As TPCO noted, the credit memos for the warranty expenses, collected by the Department during TEI's verification, reference invoice numbers for sales of OCTG products, which are not subject to this investigation. In the Department's verification report of TEI, the Department notes that "... codes corresponding to invoices for line pipe sales transactions begin with the letters "VL," whereas, codes corresponding to invoices for OCTG and drill pipe sales transactions begin with the letters "VC" and "VD," respectively." The credit memos to which Petitioners refer reference the code "VC" for OCTG. See Memorandum to the File: Verification of the Questionnaire Responses of TPCO Enterprise Inc. ("TEI"), dated July 1, 2010, at page 5, and TEI's Verification Exhibit 6B.

In Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review, the Department determined that the respondent did not incur warranty expenses in the period of review, but had incurred warranty expenses in the previous three fiscal years. The Department determined that it was appropriate to use a three-year average of the warranty expenses because warranty expenses for the products sold during the period of review may be incurred after the period of review, and because evidence indicated that not including warranty expenses was not representative of the respondent's historical experience.<sup>382</sup> In contrast, in this case, none of the warranty expenses for the three year period related to sales of subject merchandise, and so the Department has determined not to deduct warranty expenses from TPCO's reported U.S. prices for purposes of the final determination of this investigation. This case is distinguishable from OTR Tires from China. While the respondent in OTR Tires from China reported billing adjustments and warranty expenses, the Department determined that the respondent's method of reporting such expenses was unreasonable; in that it understated respondent's reported billing adjustments and warranty expenses.<sup>383</sup> Here, in this instant investigation, the Department found no evidence that TPCO incurred warranty expenses.

## Comment 29: Whether to Deduct Unreported Stevedoring Expenses from the U.S. Price

- Petitioners contend that while TPCO reported that the sales term for its CEP sales through TEI was ex-dock duty paid,<sup>384</sup> and the Department confirmed at TEI's

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<sup>382</sup> See Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review, 74 FR 50774 (Oct. 1, 2009) at Comment 4.

<sup>383</sup> See OTR Tires from China at Comment 69.

<sup>384</sup> See TPCO's Response to the Department's Supplemental Section C Questionnaire (Jan. 19, 2010) ("Supplemental Section C Response") at 5 (Public Version).

verification that TPCO was responsible for certain charges, such as stevedoring expenses incurred on a per-ship basis,<sup>385</sup> TPCO failed to report stevedoring expenses for most of the reported U.S. sales, under the field (“USSTEVEU”). Accordingly, Petitioners argue that TPCO’s failure to act to the best of its ability by not reporting such expenses, warrants the application of partial AFA for the unreported stevedoring charges involving the remaining U.S. sales.

- Petitioners argue that the Department should use as partial AFA the highest expense for USSTEVEU reported for any U.S. sale in TPCO’s latest sales database as the expense for all U.S. sales. Petitioners further argue that if the Department does not apply partial AFA here, it should apply as neutral facts available the average USSTEVEU expense for all remaining U.S. sales for which no stevedoring expenses were reported.
- TPCO argues it reported all stevedoring expenses. TPCO maintains that during its TEI’s verification, the Department examined five different subject merchandise sales and found no evidence that stevedoring expenses were incurred on these sales. According to TPCO, the Department not only examined the individual sales trace, but also reviewed other records itemizing expenses for TEI related to shipments of subject and non-subject merchandise, and found no unreported stevedoring expenses. Accordingly, TPCO argues that the Department should not apply deduct stevedoring expenses from U.S. price.

#### **Department’s Position:**

We disagree with Petitioners. During its verification of TEI, the Department examined several sales transactions and found no evidence to suggest that stevedoring expenses were incurred on these sales. The Department determined that, where TEI incurred stevedoring expenses, these were properly reported. Furthermore, in the Department’s verification of whether TPCO properly reported expenses relating to sales of subject merchandise, the Department examined other records and found no evidence of other unreported expenses, including unreported stevedoring expenses. In TEI’s verification report, the Department stated the following:

“{w}e examined TEI’s records for expenses, other than those reported in the U.S. sales database, which may be associated with the sales and or distribution of the subject merchandise during the POI. We examined the “Transaction by Account” records, and accounts payable account showing expenses incurred for each vessel, such as U.S. duty, brokerage and handling, stevedoring, and warehousing, and traced such expenses to billing invoices and payment records.”<sup>386</sup>

Based on our examination of TEI’s records, we found no evidence of unreported stevedoring expenses. Id. Accordingly, since there is no evidence on the record of this investigation supporting Petitioners’ claim that TPCO incurred other unreported stevedoring charges, we have not deducted stevedoring charges from the U.S. price

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<sup>385</sup> See TPCO’s Section C Response at 28 (Public Version).

<sup>386</sup> See TEI’s Verification Report at 10, and Verification Exhibits 6-A through 6-D.

reported for the remaining U.S. sales, for purposes of the final determination of this investigation.

### **Comment 30: Whether the 33 Percent Rule for ME Purchases is Appropriate**

- TPCO requests that the Department use actual prices charged by TPCO's ME suppliers to calculate NV. TPCO argues that even where its ME purchases did not meet the 33 percent threshold, its ME purchases are more reliable and accurate than SVs because they are a demonstrably legitimate price, product specific, and based on TPCO's ME pricing conditions.
- TPCO claims that using SVs when market-based values are available contravenes section 773(c) of the Act and that this view is shared by the CAFC, CIT and the Department.<sup>387</sup>
- TPCO argues that the Department's 33 percent threshold fails to address the reliability of the ME purchase prices, and ignores bona fide ME prices in favor of a bright line test.
- Petitioners argue that the Department's practice regarding ME purchases was established pursuant to notice and comment rulemaking, and so TPCO's suggestion that it should not be followed in this case, without notice and comment, should be rejected.<sup>388</sup>
- Petitioners argue that valuing inputs at ME prices when ME purchases constitute less than 33 percent of volume would not be representative of a company's input cost.
- Petitioners also argue that abandonment of the 33 percent rule would encourage respondents to manipulate their purchases to secure a more favorable calculation of their dumping margins.

### **Department's Position:**

The Department does not agree with TPCO that its ME purchases represent the best available information for valuing an input where the volume of TPCO's ME purchases represent less than 33 percent of the volume of its total purchases of the input. As TPCO noted, the Department will normally value at least a portion of an input using the price paid where a factor is purchased from a ME supplier and paid for in a ME currency.<sup>389</sup> Specifically, when the volume of purchases of an input from ME suppliers is below 33 percent of the total volume of purchases of the input during the relevant period, but the purchases are otherwise valid and meet the

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<sup>387</sup> See Lasko Metal Products, Inc. v. United States, 43 F.3d 1442 (Fed. Cir. 1994); Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States, 59 F. Supp. 2d 1354 (CIT 1999); Final Determinations of Sales at Less than Fair Value: Oscillating Fans and Ceiling Fans from the People's Republic of China, 56 FR 55271 (Oct. 25, 1991).

<sup>388</sup> See Antidumping Methodologies: ME Inputs, Expected Non-ME Wages, Duty Drawback; and Request for Comments, 71 FR 61716 (October 19, 2006) ("Antidumping Methodologies").

<sup>389</sup> See 19 CFR 351.408(c)(1); see also, Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China: Final Results of the 2007-2008 Administrative Review of the Antidumping Duty Order, 75 FR 8301 (February 24, 2010) and accompanying Issues and Decision Memorandum at Comment 7.

Department's existing conditions, it is the Department's practice to weight-average the ME purchase price of the input with an appropriate SV according to their respective shares of the total volume of purchases, unless case-specific facts provide adequate grounds to rebut the presumption.<sup>390</sup> As stated in Antidumping Methodologies, this threshold is not arbitrary, but is carefully crafted to balance two competing concerns; *i.e.*, to ensure that ME purchases are reflective of total purchases without contravening the regulatory requirement to "normally" accept ME purchase prices to value an entire input when they are available. The Department maintains this practice in an effort to ensure "that the ME price is representative of what the total price would have been had the firm purchased solely from the ME suppliers."<sup>391</sup> In this case, TPCO has not provided any facts which would rebut this presumption; it simply argues against the practice. Thus, while we have based TPCO's ME purchases on the actual prices paid, we have continued to base its NME purchases on other SVs.

The Department disagrees with TPCO that using SVs when market-based values are available contravenes section 773(c) of the Act and that this view is shared by the CAFC, CIT and the Department. Section 773(c) of the Act requires that the Department value FOP based on the "best available information" in "one or more ME countries that are at a level of economic development comparable to the non-ME country" and that are significant producers of "comparable" merchandise. This provision does not mandate that the Department use a respondent's ME purchases in all instances, and the Department's practice in this regard is to only use ME purchases to value all of an FOP when the ME purchases account for more than 33 percent of the respondent's total volume of purchases. Further, in Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States, 268 F. 3d 1376 (Fed. Cir. 2001), the Court upheld the Department's use of ME purchases in some instances, and specifically held that 33 percent constitutes a "meaningful" quantity. The Federal Circuit stated:

Commerce notes that the value of the FOP for domestically purchased merchandise may be obtained by extrapolating the ME import price only when a "meaningful" amount of merchandise is imported. Although we recognize that the level of a "meaningful" amount of imported merchandise must be determined on a case-by-case basis, we are persuaded that the steel imported from the United Kingdom in this case constitutes a "meaningful" amount. The steel imported from the United Kingdom constitutes approximately one-third of all steel used by ZWG in manufacturing the Washers.<sup>392</sup>

For these reasons, we have continued to value TPCO's purchases consistent with our practice.

### **Comment 31: Whether the Ratio for Pig Iron was Calculated Correctly**

- TPCO argues that the Department incorrectly identified the ratio of purchased pig iron in its FOP database. TPCO notes that the Department

<sup>390</sup> See Antidumping Methodologies at 61717-18.

<sup>391</sup> See Antidumping Methodologies, 71 FR at 61717.

<sup>392</sup> Id. at 1282; see also Antidumping Methodologies, 71 FR at 61717 (citing Shakeproof).

referenced the calculated ratio in TPCO's February 2, 2010, FOP database when comparing this ratio to TPCO's records during the Department's verification, even though this ratio was calculated incorrectly. According to TPCO, it had identified and corrected the error in its March 15, 2010, FOP database. Therefore, TPCO argues that it has correctly calculated the ratio of pig iron, and that such a ratio was substantiated by the records examined by the Department during TPCO's verification.

- Moreover, TPCO maintains that, while it calculated the ratio for purchased pig iron based on purchases of pig iron entered into TPCO's inventory, the Department calculated a different ratio of purchased pig iron using a different set of records during its verification of TPCO's responses. TPCO argues that even though the Department used TPCO's initial ratio in the Preliminary Determination, and never indicated that TPCO's method of calculating the ratio for purchased pig iron was inappropriate, the Department requested, and TPCO has provided a revised FOP database incorporating the new ratio calculated by the Department during verification. Accordingly, TPCO requests that the Department use the revised FOP database, submitted on July 9, 2010, which reflects the revised ratio of purchased pig iron, for purposes of the final determination.
- No other parties commented on this issue.

#### **Department's Position:**

We agree with TPCO that the Department, in its verification report, referred to the ratio for purchased pig iron in TPCO's February 2, 2010, FOP database. As TPCO indicated, it identified and corrected its error in its subsequently revised FOP database, dated March 15, 2010. We agree that the correct comparison would have been between the March 15, 2010, FOP database and TPCO's records regarding the ratio of purchased pig iron.

We note, however, that the Department requested that TPCO revise its calculation of the ratio for purchased pig iron because, during verification, the Department realized that TPCO calculated the ratio of purchased pig iron based on the quantity of pig iron purchased compared to the total quantity of both purchased and self-produced pig iron and not on the quantity of purchased pig iron consumed compared to the total quantity of pig iron consumption. Thus, after verification, the Department requested that TPCO revise its FOP database to account for the consumption quantity of purchased pig iron. Because TPCO submitted a revised FOP database<sup>393</sup> reflecting TPCO's consumption quantity of purchased pig iron, the Department has used TPCO's revised FOP database that was submitted on July 9, 2010, for purposes of the final determination.

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<sup>393</sup> See TPCO's revised FOP database, submitted to the Department on July 9, 2010.

### **Comment 32: Whether Freight and Pipeline Transmission Cost Should be Added to TPCO's Consumption of Water**

- TPCO argues that in its Preliminary Determination, the Department incorrectly assessed a transportation cost for the water consumed by TPCO in the production of the subject merchandise. TPCO maintains that the Department verified that TPCO did not incur freight cost associated with the factor for water because water was transported by pipeline.<sup>394</sup> Accordingly, TPCO argues that the Department should not assess any transportation costs on TPCO's consumption of water for purposes of the final determination.
- Petitioners argue that because TPCO maintains that it did not use a truck to transport water to its facilities and, instead, used pipeline, TPCO must have incurred pipeline transmission costs. Accordingly, Petitioners argue that the Department should calculate a unit factor for pipeline transmission and apply it to the reported factor for water in the final determination. Petitioners argue that the Department should use the same transmission cost for pipeline transmission which was used in OCTG from China. Petitioners note that they have attached to Exhibit J of their Final Submission of Surrogate Value Data, which they assert is the same SV which was used for transmission costs in OCTG from China.
- Petitioners argue that the Department should not accept TPCO's assertion that it did not incur transportation costs because it reported a distance for water and stated that it would forgo the ability to make changes to its transportation distances. Petitioners assert that they "relied on TPCO's statement that it had 'forgone' its ability" to make changes to distance, and so neither the Department nor Petitioners were able to meaningfully analyze the issue.<sup>395</sup> Therefore, the Department should use the distance for water which TPCO originally reported.

#### **Department's Position:**

We agree with TPCO that we should not include freight costs for the water consumed by TPCO. In the Preliminary Determination, the Department applied freight costs to TPCO's reported factor for water because TPCO provided conflicting information on the record with respect to the mode of transportation of water.<sup>396</sup> However, during its verification of TPCO's responses, the Department found no evidence that the water consumed in the production of the subject merchandise was supplied via truck. See TPCO's Verification Report at 19, and Verification Exhibit 19. Accordingly, the Department did not assess transportation costs to TPCO's reported factor for water in its final margin calculation. Moreover, we find that Petitioners' argument that

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<sup>394</sup> See TPCO's Verification Report at 19.

<sup>395</sup> See Petitioners' rebuttal brief at 19.

<sup>396</sup> See TPCO's FOP Spreadsheet provided in Exhibit 10 of TPCO's March 16, 2010, submission, in which TPCO reported that water was delivered by truck. See, also, TPCO's Supplier Spreadsheet provided in the same submission, in which TPCO reported that water was supplied by pipeline; Id.



the Department should apply transmission cost to the water transmitted via pipelines, as in OCTG from China, is misplaced. The Department found no evidence that TPCO incurs additional costs for use of these pipelines. Additionally, the transmission cost used in OCTG from China, to which Petitioners refer, is specifically related to the SV for natural gas, where the SV included transmission costs. The SV for water is based on a ME price of water, which does not include a separate charge for transmission costs.

We do not agree with Petitioners' argument that we should continue to value the distance for water transportation which TPCO originally reported, because, at verification, we determined that the water used in the production of subject merchandise was not delivered via truck. Therefore, it would be inappropriate to continue to value distance when we verified that there was no distance associated with TPCO's consumption of water.

#### **IV. Hengyang-Specific Issues:**

##### **Comment 33: Pig Iron ME Purchases**

- Petitioners note that at Hengyang's verification, Hengyang disclosed a so-called minor correction in its reported total quantity of NME purchases of pig iron during the POI. However, petitioners contend that Hengyang's correction was not minor and that the Department, for the final determination, should apply partial AFA with respect to Hengyang's pig iron purchases. Petitioners argue that Hengyang did not act to the best of its ability and that the Department, as partial AFA for the final results, should value all the pig iron that Hengyang used to produce seamless pipe using a SV based on WTA data for imports of pig iron into India.
- Petitioners state that, for the final determination, if the Department does not apply partial AFA with respect to Hengyang's pig iron purchases, then the Department should use the corrected purchase quantities of pig iron reported at verification.
- Hengyang contends that it inadvertently underreported its quantity of non-ME pig iron purchases during the POI. However, Hengyang noted that it correctly reported its consumption of pig iron used in its reported FOP for pig iron. Hengyang states it did not benefit by correcting its pig iron purchases and that it properly reported its corrected data at verification. Hengyang contends that, for the final determination, the Department should use the corrected quantities of ME purchases of pig iron as reviewed and verified by Department officials without resorting to partial AFA.

##### **Department's Position:**

The Department does not believe that partial AFA is appropriate because, at verification, the Department accepted Hengyang's updated pig iron purchases as a minor correction. Petitioners

cite to Candles from China<sup>397</sup> as support for applying partial AFA against Hengyang. However, we do not agree that this case supports Petitioners' position. In Candles from China, we did not accept a proposed correction by the respondent because, if accepted, the previously unreported production order would have amounted to a significant increase in the production for the period of review.<sup>398</sup> In our case, the total pig iron consumed did not increase as a result of Hengyang's correction. We agree with Petitioners that new information will be accepted by the Department at verification only when: (1) the need for the information was not evident previously; (2) the information makes minor corrections to information already on the record, or (3) the information corroborates, supports, or clarifies information already on the record.<sup>399</sup> At verification in OTR Tires from China,<sup>400</sup> the Department selected as verification exhibits certain information that the Department believed corroborated, supported and/or clarified SV information already on the record. In the instant case, Hengyang submitted the new information as a minor correction to information on the record and the Department accepted and confirmed that this information was correct. For example, at verification, the Department confirmed that Hengyang had underreported its quantity of NME purchases by examining and accepting supporting documentation. We note that Hengyang's updated data increased the proportion of Hengyang's NME pig iron purchases compared to ME pig iron purchases but did not change Hengyang's FOP for pig iron. Therefore, for the final results, because the Department accepted and confirmed this minor correction at verification, the Department has adjusted the ME and NME percentages for pig iron.

#### **Comment 34: EP Sales Classification to a U.S. Customer**

- Petitioners argue that the Department must apply partial AFA to certain transfers of Hengyang's merchandise to U.S. customer A, which Hengyang reported as EP sales, because the transactions were a certain type of transfer<sup>401</sup> which calls for treatment as a CEP transaction. These transactions were made under an open account agreement between Hengyang and U.S. customer A, and Petitioners contend that the sales associated with these transactions were made after importation to the United States and so are CEP sales. Petitioners contend that because of Hengyang's misclassification of these open account agreement transactions as EP sales, the Department does not have the correct sales on the record to calculate Hengyang's antidumping margin for these transactions.
- Based on the Department's findings at verification for these open account agreement transactions, Petitioners contend that these are not sales but are actually another type of transfer of merchandise.<sup>402</sup> Petitioners argue that in prior cases, the Department has found that certain transactions are not sales when a number of factors are present.<sup>403</sup>

<sup>397</sup> See Petroleum Wax Candles From the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 68 FR 13264, 13265 (March 19, 2003) ("Candles from China") and accompanying Issues and Decision Memorandum at Comment 3.

<sup>398</sup> See Candles from China at 13265.

<sup>399</sup> See Verification Agenda for Hengyang, April 29, 2010, at 2 (public version).

<sup>400</sup> See OTR Tires from China and accompanying Issues and Decision Memorandum at Comment 36.

<sup>401</sup> See Proprietary Memorandum.

<sup>402</sup> Id.

<sup>403</sup> Id.

Petitioners contend that Hengyang's sales to U.S. customer A exhibit the same fact pattern as the cases in which the Department found that transactions were not sales of merchandise.

- Petitioners note that: (1) at verification, the Department officials discovered that U.S. customer A did not have to pay Hengyang until the earlier of when it received payment from its customers or 180 days<sup>404</sup> after receiving the merchandise;<sup>405</sup> and 2) Hengyang did not record the full sales quantity in its accounting system until after U.S. customer A sold the merchandise so that a portion of the sales quantity could be used to record any future revenue associated with those sales.<sup>406</sup>
- Also, Petitioners argue that other terms in the open account agreement<sup>407</sup> indicate that the transactions to customer A were not sales when the merchandise was shipped to the customer.<sup>408</sup> Additionally, Petitioners claim that Hengyang's open account agreement also indicates that Hengyang was entitled to a portion of the profit on such sales.<sup>409</sup>
- Petitioners argue that these transactions are not the sales that should be used to calculate Hengyang's antidumping margin.<sup>410</sup>
- Petitioners argue that necessary information is not on the record and that Hengyang significantly impeded the proceeding by incorrectly characterizing these sales. Petitioners further contend that since Hengyang did not properly report its arrangement with U.S. customer A, Hengyang has not cooperated to the best of its ability and that the Department must apply partial AFA, and cite OCTG from China, where the Department found that TPCO had failed to provide critical information and had thus impeded the investigation. Petitioners argue that the Department should not simply disregard these transactions because of the percentage of POI sales which they represent, and thus distinguish this case from other cases where sales were disregarded.<sup>411</sup>
- Hengyang rebuts Petitioners' characterizations of its sales to U.S. customer A by stating that it properly reported these sales as EP transactions and that the material terms of sale were set prior to importation under an open account agreement rather than under the type of arrangement claimed by Petitioners. Hengyang contends that it reported its open account agreement in its December 10, 2009, Section A questionnaire response at Exhibit A-19, and argues that if Petitioners had concerns that these sales should have been

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<sup>404</sup> See Memorandum to The File from Zev Primor, Senior International Trade Compliance Specialist, Re: Verification of the Questionnaire Responses of Hengyang Steel Tube Group Int'l Trading Inc., and its affiliates Hengyang Valin Steel Tube Co., Ltd., and Hengyang Valin MPM Tube Co., Ltd., (collectively, Hengyang) ("Hengyang verification report"), Verification Exhibit 6 at 59-60 (business proprietary version).

<sup>405</sup> See Hengyang verification report at 7 (public version).

<sup>406</sup> Id.

<sup>407</sup> See Hengyang verification report, Verification Exhibit 6 at 59-60 (business proprietary version).

<sup>408</sup> See Proprietary Memorandum.

<sup>409</sup> Id. at 7 (public version).

<sup>410</sup> See AK Steel v. United States, 226 F. 3d 1361 (Fed. Cir. 2001).

<sup>411</sup> See Proprietary Memorandum.

classified as CEP, Petitioners had ample time to provide comments but Petitioners chose not to do so.

- Hengyang contends that the open account agreement effectuated sales of subject merchandise from Hengyang to U.S. customer A.<sup>412</sup> In addition, Hengyang issued a commercial invoice to U.S. customer A for the subject merchandise and recorded the sales as accounts receivable and made corresponding entries in its books and records. Hengyang contends that its commercial invoice demonstrates a sale was made prior to importation to the United States and that it only provided beneficial payment terms to its U.S. customer A to help facilitate further sales.
- Hengyang also claims that it would have handled these transactions differently and recorded them differently in its accounting records had they been the type of transactions claimed by Petitioners. According to Hengyang, the terms of the transactions indicate they were sales.<sup>413</sup> Hengyang also argues that Petitioners misrepresent the record when Petitioners claim that Hengyang agreed to pay a commission to U.S. customer A in connection with the transactions at issue. Hengyang contends that the open account agreement contained certain terms regarding price and payment and that it provided beneficial payment terms in exchange for receipt of any additional revenue but nothing in the open account agreement supports the assertion that Hengyang was required to pay a commission.
- Hengyang contends that if the Department determines that Hengyang's sales made under its open account agreement should have been reported as CEP sales, other information on the record nonetheless indicates that the sales must be disregarded.<sup>414</sup>
- Finally, Hengyang rebuts Petitioners argument that Hengyang failed to act to the best of its ability. Hengyang contends that it did not impede the investigation when it reported its sales to U.S. customer A as EP sales because this is the correct classification.

### **Department's Position:**

The Department disagrees with Petitioners. Record evidence indicates that Hengyang's open account sales to U.S. customer A are EP sales and not the type of sales alleged by Petitioners and thus CEP sales. Section 772(a) of the Act states that:

the term "EP" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c).

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<sup>412</sup> See Hengyang verification report, Verification Exhibit 6 at 59 (business proprietary version).

<sup>413</sup> See Hengyang's supplemental Section C questionnaire response, January 19, 2010, at 3.

<sup>414</sup> Id. at 9 and Hengyang verification report, Verification Exhibit 9 at 7. Also, see Proprietary Memorandum.

Petitioners cite to a number of cases as support that Hengyang's sales to U.S. customer A were a certain type of transaction which should be classified as CEP.<sup>415</sup> However, record evidence indicates that Hengyang's open account sales to U.S. customer A are EP sales and not CEP sales. Hengyang issued a commercial invoice to U.S. customer A for the subject merchandise and recorded the sales as accounts receivable and made corresponding entries in its books and records. The Department agrees with Hengyang that when it issued an invoice to U.S. customer A, an EP sale was made because the subject merchandise was first sold before the date of importation by Hengyang, located in the China, to an unaffiliated customer in the United States. See section 772(a) of the Act; see also AK Steel, 226 F. 3d at 1367 (holding that the proper classification of sales as EP under the plain language of the statute is where the first sale took place prior to importation to an unaffiliated customer in the United States). Also, if these sales to U.S. customer A were the type of transaction alleged by Petitioners, then Hengyang would have handled these transactions differently and recorded them differently in its accounting records. In contrast, Hengyang issued an invoice when the merchandise was exported to the U.S. customer A. Moreover, certain terms of the transaction indicate that they were sales.<sup>416</sup> Therefore, based on record evidence, we disagree with Petitioners that certain criteria necessary for finding that a sale took place were not satisfied.

The Department also notes that there is no record evidence that Hengyang received any additional revenue, based on the terms of the open account agreement and Hengyang's U.S. sales database. This provides further evidence that these sales were made prior to importation into the United States. In addition, after reviewing the open account agreement, the Department did not find any evidence that U.S. customer A was paid any commissions, in contrast to a case cited by Petitioners.<sup>417</sup> The facts of this case are also different from another case cited by Petitioners which dealt with when the terms of sale were set and when the sale was made.<sup>418</sup> In contrast, in this case, the terms of sale were set when Hengyang issued its commercial invoice to U.S. customer A, which was prior to importation into the United States, and not later based on other events. Another case relied upon by Petitioners, is also not on point because the invoice was issued after importation and its issuance was dependent upon other factors. In this case, the invoice is issued prior to importation and the sale is not dependent upon other factors.

Finally, because the Department determines that the proper classification of Hengyang's sales to U.S. customer A is EP, the Department does not conclude that necessary information is missing from the record or that Hengyang significantly impeded the proceeding. Therefore, the Department has determined not to resort to facts available. In addition, the Department does not determine that Hengyang failed to cooperate by not acting to the best of its ability because, unlike in OCTG from China, we do not find that critical information was not provided despite multiple requests for the information. Therefore it is not appropriate to apply partial AFA for Hengyang's sales to U.S. customer A.

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<sup>415</sup> See Proprietary Memorandum.

<sup>416</sup> See Hengyang's supplemental Section C questionnaire response, January 19, 2010, at 3. See also Hengyang verification report, Exhibit 9.

<sup>417</sup> See Proprietary Memorandum.

<sup>418</sup> Id.

- Petitioners argue that the Department must apply partial AFA to certain transfers of Hengyang's merchandise to U.S. customer A, which Hengyang reported as EP sales, because the transactions were a certain type of transfer<sup>419</sup> which calls for treatment as a CEP transaction. These transactions were made under an open account agreement between Hengyang and U.S. customer A, and Petitioners contend that the sales associated with these transactions were made after importation to the United States and so are CEP sales. Petitioners contend that because of Hengyang's misclassification of these open account agreement transactions as EP sales, the Department does not have the correct sales on the record to calculate Hengyang's antidumping margin for these transactions.
- Based on the Department's findings at verification for these open account agreement transactions, Petitioners contend that these are not sales but are actually another type of transfer of merchandise.<sup>420</sup> Petitioners argue that in prior cases, the Department has found that certain transactions are not sales when a number of factors are present.<sup>421</sup> Petitioners contend that Hengyang's sales to U.S. customer A exhibit the same fact pattern as the cases in which the Department found that transactions were not sales of merchandise.
- Petitioners note that: (1) at verification, the Department officials discovered that U.S. customer A did not have to pay Hengyang until the earlier of when it received payment from its customers or 180 days<sup>422</sup> after receiving the merchandise;<sup>423</sup> and 2) Hengyang did not record the full sales quantity in its accounting system until after U.S. customer A sold the merchandise so that a portion of the sales quantity could be used to record any future revenue associated with those sales.<sup>424</sup>
- Also, Petitioners argue that other terms in the open account agreement<sup>425</sup> indicate that the transactions to customer A were not sales when the merchandise was shipped to the customer.<sup>426</sup> Additionally, Petitioners claim that Hengyang's open account agreement also indicates that Hengyang was entitled to a portion of the profit on such sales.<sup>427</sup>
- Petitioners argue that these transactions are not the sales that should be used to calculate Hengyang's antidumping margin.<sup>428</sup>

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<sup>419</sup> See Proprietary Memorandum.

<sup>420</sup> Id.

<sup>421</sup> Id.

<sup>422</sup> See Memorandum to The File from Zev Primor, Senior International Trade Compliance Specialist, Re: Verification of the Questionnaire Responses of Hengyang Steel Tube Group Int'l Trading Inc., and its affiliates Hengyang Valin Steel Tube Co., Ltd., and Hengyang Valin MPM Tube Co., Ltd., (collectively, Hengyang) ("Hengyang verification report"), Verification Exhibit 6 at 59-60 (business proprietary version).

<sup>423</sup> See Hengyang verification report at 7 (public version).

<sup>424</sup> Id.

<sup>425</sup> See Hengyang verification report, Verification Exhibit 6 at 59-60 (business proprietary version).

<sup>426</sup> See Proprietary Memorandum.

<sup>427</sup> Id. at 7 (public version).

<sup>428</sup> See AK Steel v. United States, 226 F. 3d 1361 (Fed. Cir. 2001).

- Petitioners argue that necessary information is not on the record and that Hengyang significantly impeded the proceeding by incorrectly characterizing these sales. Petitioners further contend that since Hengyang did not properly report its arrangement with U.S. customer A, Hengyang has not cooperated to the best of its ability and that the Department must apply partial AFA, and cite OCTG from China, where the Department found that TPCO had failed to provide critical information and had thus impeded the investigation. Petitioners argue that the Department should not simply disregard these transactions because of the percentage of POI sales which they represent, and thus distinguish this case from other cases where sales were disregarded.<sup>429</sup>
- Hengyang rebuts Petitioners' characterizations of its sales to U.S. customer A by stating that it properly reported these sales as EP transactions and that the material terms of sale were set prior to importation under an open account agreement rather than under the type of arrangement claimed by Petitioners. Hengyang contends that it reported its open account agreement in its December 10, 2009, Section A questionnaire response at Exhibit A-19, and argues that if Petitioners had concerns that these sales should have been classified as CEP, Petitioners had ample time to provide comments but Petitioners chose not to do so.
- Hengyang contends that the open account agreement effectuated sales of subject merchandise from Hengyang to U.S. customer A.<sup>430</sup> In addition, Hengyang issued a commercial invoice to U.S. customer A for the subject merchandise and recorded the sales as accounts receivable and made corresponding entries in its books and records. Hengyang contends that its commercial invoice demonstrates a sale was made prior to importation to the United States and that it only provided beneficial payment terms to its U.S. customer A to help facilitate further sales.
- Hengyang also claims that it would have handled these transactions differently and recorded them differently in its accounting records had they been the type of transactions claimed by Petitioners. According to Hengyang, the terms of the transactions indicate they were sales.<sup>431</sup> Hengyang also argues that Petitioners misrepresent the record when Petitioners claim that Hengyang agreed to pay a commission to U.S. customer A in connection with the transactions at issue. Hengyang contends that the open account agreement contained certain terms regarding price and payment and that it provided beneficial payment terms in exchange for receipt of any additional revenue but nothing in the open account agreement supports the assertion that Hengyang was required to pay a commission.
- Hengyang contends that if the Department determines that Hengyang's sales made under its open account agreement should have been reported as CEP sales, other information on the record nonetheless indicates that the sales must be disregarded.<sup>432</sup>

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<sup>429</sup> See Proprietary Memorandum.

<sup>430</sup> See Hengyang verification report, Verification Exhibit 6 at 59 (business proprietary version).

<sup>431</sup> See Hengyang's supplemental Section C questionnaire response, January 19, 2010, at 3.

<sup>432</sup> Id. at 9 and Hengyang verification report, Verification Exhibit 9 at 7. Also, see Proprietary Memorandum.

- Finally, Hengyang rebuts Petitioners argument that Hengyang failed to act to the best of its ability. Hengyang contends that it did not impede the investigation when it reported its sales to U.S. customer A as EP sales because this is the correct classification.

### **Department's Position:**

The Department disagrees with Petitioners. Record evidence indicates that Hengyang's open account sales to U.S. customer A are EP sales and not the type of sales alleged by Petitioners and thus CEP sales. Section 772(a) of the Act states that:

the term "EP" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c).

Petitioners cite to a number of cases as support that Hengyang's sales to U.S. customer A were a certain type of transaction which should be classified as CEP.<sup>433</sup> However, record evidence indicates that Hengyang's open account sales to U.S. customer A are EP sales and not CEP sales. Hengyang issued a commercial invoice to U.S. customer A for the subject merchandise and recorded the sales as accounts receivable and made corresponding entries in its books and records. The Department agrees with Hengyang that when it issued an invoice to U.S. customer A, an EP sale was made because the subject merchandise was first sold before the date of importation by Hengyang, located in the China, to an unaffiliated customer in the United States. See section 772(a) of the Act; see also AK Steel, 226 F. 3d at 1367 (holding that the proper classification of sales as EP under the plain language of the statute is where the first sale took place prior to importation to an unaffiliated customer in the United States). Also, if these sales to U.S. customer A were the type of transaction alleged by Petitioners, then Hengyang would have handled these transactions differently and recorded them differently in its accounting records. In contrast, Hengyang issued an invoice when the merchandise was exported to the U.S. customer A. Moreover, certain terms of the transaction indicate that they were sales.<sup>434</sup> Therefore, based on record evidence, we disagree with Petitioners that certain criteria necessary for finding that a sale took place were not satisfied.

The Department also notes that there is no record evidence that Hengyang received any additional revenue, based on the terms of the open account agreement and Hengyang's U.S. sales database. This provides further evidence that these sales were made prior to importation into the United States. In addition, after reviewing the open account agreement, the Department did not find any evidence that U.S. customer A was paid any commissions, in contrast to a case cited by Petitioners.<sup>435</sup> The facts of this case are also different from another case cited by Petitioners

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<sup>433</sup> See Proprietary Memorandum.

<sup>434</sup> See Hengyang's supplemental Section C questionnaire response, January 19, 2010, at 3. See also Hengyang verification report, Exhibit 9.

<sup>435</sup> See Proprietary Memorandum.



which dealt with when the terms of sale were set and when the sale was made.<sup>436</sup> In contrast, in this case, the terms of sale were set when Hengyang issued its commercial invoice to U.S. customer A, which was prior to importation into the United States, and not later based on other events. Another case relied upon by Petitioners, is also not on point because the invoice was issued after importation and its issuance was dependent upon other factors. In this case, the invoice is issued prior to importation and the sale is not dependent upon other factors.

Finally, because the Department determines that the proper classification of Hengyang's sales to U.S. customer A is EP, the Department does not conclude that necessary information is missing from the record or that Hengyang significantly impeded the proceeding. Therefore, the Department has determined not to resort to facts available. In addition, the Department does not determine that Hengyang failed to cooperate by not acting to the best of its ability because, unlike in OCTG from China, we do not find that critical information was not provided despite multiple requests for the information. Therefore it is not appropriate to apply partial AFA for Hengyang's sales to U.S. customer A.

### **Comment 35: Steel Scrap Offset**

- Petitioners contend that, in the Preliminary Determination, the Department should not have granted Hengyang a steel scrap by-product offset. Petitioners argue that Hengyang did not include its reintroduced steel scrap usage rates (reported in field 6.3 of Hengyang's FOP database) in its reported FOP for steel scrap (in field 2.13 of Hengyang's FOP database), which only included Hengyang's purchases of steel scrap. Petitioners cite to Wire Decking from China,<sup>437</sup> where the Department did not grant a by-product offset because the steel scrap generated during the production process was not included in the respondent's steel scrap consumption FOP. That is, the respondent had reported a net steel scrap FOP for its consumption equaling purchased steel scrap less the steel scrap generated during the production process in the final determination. Therefore, Petitioners argue, because Hengyang also reported a net steel scrap consumption FOP, the Department should not grant a by-product offset for Hengyang's reintroduced steel scrap generated during Hengyang's production process.
- Hengyang rebuts Petitioners' argument by stating that Hengyang reported its total consumption of steel scrap in field 2.13, regardless of whether that steel scrap was purchased or re-introduced into production. Hengyang contends that the Department verified its consumption of steel scrap.

### **Department's Position:**

The Department agrees with Hengyang that Hengyang reported both its purchased steel scrap and reintroduced (self-produced) steel scrap in field 2.13, and not a net steel scrap FOP.

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<sup>436</sup> Id.

<sup>437</sup> See Wire Decking from China, 75 FR 32905 (June 10, 2010) and accompanying Issues and Decision Memorandum at Comment 7.

Therefore, we will continue to grant an offset for steel scrap in the final determination.

In Wire Decking from China, the Department denied a by-product offset for steel scrap because the respondent reported the actual amount of steel consumed to produce one finished product without accounting for scrap generated in the production process.<sup>438</sup> In this case, however, Hengyang reported the amount of scrap generated in producing subject merchandise and reported both purchased and reintroduced steel scrap (not a net steel scrap FOP) in field 2.13. In Hengyang's December 29, 2010, original Section D response, at page 26, Hengyang stated that it does not track consumption of purchased steel scrap vis-à-vis steel scrap that it self-produced and then reintroduced into the production cycle.

To calculate a net input consumption figure for these two FOP (purchased steel scrap and reintroduced steel scrap), the evidence indicates that Hengyang reported in field 2.13 both its purchased steel scrap and reintroduced steel scrap and that in field 6.3, Hengyang reported its reintroduced steel scrap. In addition, we agree with Hengyang that evidence on page 58 of Verification Exhibit 27 of the Hengyang verification report confirms what steel scrap FOP Hengyang reported for fields 2.13 and 6.3 based on Hengyang's codes for these fields.<sup>439</sup> Therefore, for the final determination, the Department will continue to grant a by-product offset for Hengyang's reintroduced steel scrap as the FOP for reintroduced steel scrap is already included in field 2.13.

#### **Comment 36: Byproduct Offset for the Recovery of Blast Furnace Gas**

- Petitioners argue that, for the final determination, the Department should not grant Hengyang a by-product offset for its reintroduced (recovered) blast furnace gas (reported in field 6.1) because Hengyang did not include the FOP and usage rates for the further processing that is required to use blast furnace gas. Petitioners state that blast furnace gas must be further processed (i.e., cleaned and cooled) before the blast furnace gas can be used and that record evidence in Hengyang's production flow chart<sup>440</sup> demonstrates that Hengyang also further processes its blast furnace gas prior to using it. However, Petitioners claim that Hengyang did not report these additional FOP (or even bother to explain the additional processing required) and therefore, consistent with Department practice,<sup>441</sup> Hengyang is not entitled to a by-product offset (credit).
- Petitioners also request that if the Department continues to grant Hengyang a by-product offset for its reintroduced blast furnace gas (reported in field 6.1), the Department must value as an FOP the blast furnace gas (reported in field 5.4) that Hengyang used to produce seamless pipe.

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<sup>438</sup> Id.

<sup>439</sup> See Hengyang verification report, Verification Exhibit 27 at 58.

<sup>440</sup> See Petitioners' March 26, 2010, new factual information submission at Exhibit 52.

<sup>441</sup> See Certain Preserved Mushrooms from the People's Republic of China: Preliminary Results of the Eighth New Shipper Review, 70 FR 42034, 42037 (July 21, 2005) ("Mushrooms from China"), unchanged in Certain Preserved Mushrooms from the People's Republic of China: Notice of Final Results of the Eighth New Shipper Review, 70 FR 60789 (October 19, 2005).

- Hengyang contends that the Department should not value the blast furnace gas in field 5.4 because this blast furnace gas was self-produced and the FOP inputs required to produce this blast furnace gas was reported in Hengyang's FOP database. Hengyang did not specifically address Petitioners' argument on the processing required to reintroduce blast furnace gas.

### **Department's Position:**

The Department agrees with Petitioners that the Department's practice is that, in order for a respondent to be granted a byproduct offset (credit), the respondent must report all of the FOP required to further process the by-product prior to reintroduction into production and/or it being sold for revenue, as in Mushrooms from China. These FOP are necessary because simply providing a byproduct offset without accounting for the additional costs incurred before the byproduct can be reintroduced into production, does not accurately reflect the impact that the reintroduced byproduct has on total costs. In the instant case, Petitioners provided evidence that Hengyang must further process its blast furnace gas by-product prior to its reintroduction in production. For example, Hengyang's production flow chart illustrates that Hengyang further processes its blast furnace gas via several production steps which uses equipment, such as a gravity dust catcher, a bag filter, and a decompressor valve. We agree with Petitioners that these are additional steps. However, consistent with Diamond Sawblades from China,<sup>442</sup> we find that the additional factors (equipment) used by Hengyang are not replaced so regularly as to represent a direct factor but rather are overhead items, which would not be valued separately. Therefore, consistent with Department practice, because the additional processing required for the blast furnace gas to be reintroduced into production is an overhead expense and overhead expenses are accounted for through the financial ratios, we are granting Hengyang a by-product offset for its reintroduced blast furnace gas (reported in field 6.1).

We agree with Hengyang that since it has already reported the FOP required to generate the blast furnace gas reported in field 5.4, the Department is already valuing these FOP in Hengyang's FOP buildup. Therefore, for the final determination, we continue to find that the blast furnace gas FOP, as reported in field 5.4, does not need to be valued.

### **Comment 37: Whether Hengyang Failed to Report Certain Alloying Materials**

- Petitioners contend that Hengyang did not report the FOP for certain alloying materials used to produce subject merchandise. Petitioners cite Hengyang's U.S. sales trace verification exhibits, which demonstrate via mill certificates that Hengyang used several alloying materials which it did not report to the Department in its FOP database.

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<sup>442</sup> See Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 71 FR 29303 (May 22, 2006) ("Diamond Sawblades from China") and accompanying Issues and Decision Memorandum at Comment 2 at 12.

Petitioners contend that the Department, consistent with its practice,<sup>443</sup> should apply partial AFA to value these unreported alloying material because Hengyang had numerous opportunities to report these alloying materials in its questionnaire responses but did not do so, nor did Hengyang state why it could not report these alloying materials.

- Hengyang argues that it reported all alloying materials used to manufacture subject merchandise as evidenced by the cost reconciliation and FOP buildup. Hengyang argues that the cost reconciliation and FOP buildup were verified by Department officials, who found no discrepancies.<sup>444</sup> At verification, Hengyang argues that Department officials tied what Hengyang reported in its responses with its internal records, noting that Verification Exhibit 26 is an FOP buildup for a CONNUM which includes subject merchandise with the same internal code as Verification Exhibit 7, a U.S. sales trace which generated the mill certificates cited by Petitioners. Hengyang contends that a review of the FOP shows that steel scrap is the largest material input and that the alloying materials in Hengyang's final product are from the steel scrap. Hengyang argues that, because of Hengyang's reliance on steel scrap as an input, "it would be surprising" if the mill certificates of the final products did not include additional alloying materials.<sup>445</sup>

### **Department's Position:**

The Department disagrees with Petitioners. Department officials verified that Hengyang reported all FOP in its records.<sup>446</sup> As steel scrap is a significant input in Hengyang's production of subject merchandise, the Department agrees with Hengyang that the alloying materials to which Petitioners refer were in the steel scrap and not directly purchased by Hengyang. Trace elements of alloying materials are consistent with Hengyang's reported use of steel scrap as an input and, therefore, the Department does not determine that Hengyang failed to cooperate by not acting to the best of its ability by failing to report all of its FOP. Therefore, the use of partial AFA is not warranted. Also, as support for their contention that the Department should apply partial AFA for unreported FOP, the Petitioners cite Frozen Shrimp from China, a case in which the Department discovered at verification that the respondent had not reported an FOP.<sup>447</sup> In the instant case, as noted above, Department officials did not discover any unreported FOP at verification.

### **Comment 38: Treating Certain Auxiliary Materials as Inputs**

- Petitioners argue that, for the final determination, the Department should value four materials (carbon fine powder, dolomite, calcium carbon, and limestone) as FOP rather

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<sup>443</sup> See Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 10026, 10029 (March 9, 2009) ("Frozen Shrimp from China"), unchanged in Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 46565 (September 10, 2009).

<sup>444</sup> See Hengyang verification report at 10.

<sup>445</sup> See Hengyang's rebuttal brief at 15.

<sup>446</sup> See Hengyang verification report at 9 - 14.

<sup>447</sup> See Frozen Shrimp from China.

than as factory overhead. Petitioners contend that these materials are not overhead because: (1) they are fluxes which are consumed when making seamless pipe; (2) Hengyang's books and records show that they are inventoried and expensed on a monthly basis and not expensed as overhead when purchased; and (3) they are significant inputs in the production process.

- Petitioners argue that it is the Department's practice to value inputs as FOP when they are consumed for the purpose of manufacturing subject merchandise.<sup>448</sup> Petitioners argue that Hengyang uses fluxes in the steel-making process to remove impurities from the molten iron produced in Hengyang's blast furnace<sup>449</sup> and so these inputs should be valued as FOP. Furthermore, Petitioners contend that the Department's practice is to treat fluxes as FOP rather than factory overhead, citing Brake Drums from China and Pure Magnesium from China.<sup>450</sup>
- Hengyang contends that these auxiliary materials are: (1) not treated as direct material inputs in the normal course of business; (2) do not become part of the final product; and (3) are not tracked on a job order basis, but instead are managed in the same manner as all overhead materials. Therefore, Hengyang argues that, in past cases, the Department has determined that auxiliary materials such as these are properly treated as factory overhead, citing Ammonium Nitrate from Belarus<sup>451</sup> and Silicon Metal from China.<sup>452</sup>

### Department's Position:

For the final determination, the Department will continue to consider the materials in question as overhead items rather than direct FOP. This is consistent with the Department's determination in OCTG from China, in which the Department valued similar materials as overhead, as well as the Department's determination in Silicon Metal from China, where we valued materials which were not physically incorporated into subject merchandise as overhead.<sup>453</sup> In Hengyang's February 2, 2010, supplemental questionnaire response at 2 and Exhibit SD-1, Hengyang stated that these auxiliary materials were not direct materials because they were not incorporated into subject merchandise. As Petitioners state, and Hengyang confirms,<sup>454</sup> these inputs are fluxing agents used in the steel-making process. These fluxing agents are not direct materials but are used to remove impurities with the end product being slag, not subject merchandise.<sup>455</sup> Further,

<sup>448</sup> See Certain Threaded Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 8907 (February 27, 2009) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>449</sup> See Hengyang verification report at 17-18.

<sup>450</sup> See Notice of Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People's Republic of China, 62 FR 9160, 9169 (February 28, 1997) ("Brake Drums from China"); and Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium in Granular Form From the People's Republic of China, 66 FR 49345 (September 27, 2001) ("Pure Magnesium from China") at Comment 6.

<sup>451</sup> See Notice of Final Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions from Belarus, 68 FR 9055 (February 27, 2003) ("Ammonium Nitrate from Belarus") at Comment 2.

<sup>452</sup> See Silicon Metal from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 75 FR 1592 (January 12, 2010) ("Silicon Metal from China") at Comment 12.

<sup>453</sup> See OCTG from China at Comment 18; Silicon Metal from China at Comment 12.

<sup>454</sup> See Hengyang's February 2, 2010, supplemental questionnaire response at Exhibit SD-1.

<sup>455</sup> Id.

Hengyang stated that its own accounting system classifies auxiliary materials with materials for machinery repairs under manufacturing overhead, rather than as raw material costs. In addition, Hengyang tracks the usage of raw materials and overhead material differently. The company tracks the usage of raw materials on a job order basis but the usage of overhead materials is tracked on a lump sum basis. In other words, overhead items are withdrawn from warehouse on a lump sum basis without specifying the job order or products to be produced, which supports the determination to include these materials as overhead since they are not linked to specific production.<sup>456</sup> At verification, Department officials confirmed that these auxiliary materials are withdrawn from warehouse without a link to a specific job order.<sup>457</sup>

The Department recognizes that, in Brake Drums from China, the Department valued limestone as a direct material, stating that it is “consumed during the smelting process as flux.”<sup>458</sup> However, as stated above, we have determined in this case, and in OCTG from China, that it is appropriate to value these auxiliary materials as factory overhead because they are not direct materials in the production of subject merchandise. Therefore, we have continued to value these materials as factory overhead, rather than as direct materials.

#### **Comment 39: Application of Certain Adjustment to the Factors for Sintered Iron Ore**

- Petitioners argue that, at verification, the Department discovered that Hengyang’s POI production quantity of sintered iron ore used in Hengyang’s FOP buildups differed from the production quantity of sintered iron ore that was recorded in Hengyang’s own books and records. Therefore, for the final determination, Petitioners contend that the Department should adjust Hengyang’s FOP for sintered iron ore to correct for this discrepancy.
- Hengyang states that it already submitted a revised FOP database which accounted for the discrepancy in Hengyang’s sintered iron ore consumption on July 7, 2010, as requested by the Department. Therefore, no additional adjustments are necessary for the final determination.

#### **Department’s Position:**

The Department agrees with Hengyang that no additional adjustments are necessary because, for the final determination, we are using Hengyang’s corrected FOP database which accurately reflects Hengyang’s FOP for sintered iron ore.

#### **Comment 40: Critical Circumstances**

- Hengyang stated that the Department must revisit its critical circumstances analysis using the final AD margin calculated for Hengyang.

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<sup>456</sup> See Hengyang’s February 2, 2010, supplemental questionnaire response at 2.

<sup>457</sup> See Hengyang verification report at 17-18.

<sup>458</sup> See Brakes Drums from China at Comment 8.

- In rebuttal, Petitioners argue that all of the requirements for a finding of critical circumstances will continue to be satisfied after the Department calculates the final dumping margin for Hengyang and thus, the Department should continue to find that critical circumstances exist for imports of subject merchandise from Hengyang.

### **Department Position:**

Based on Hengyang's AD margin for the final determination, we continue to find that there is reason to believe or suspect that critical circumstances exist for imports of subject merchandise from Hengyang.<sup>459</sup> As in the Preliminary Determination, we have determined that (A) in accordance with section 733(3)(1)(A)(ii) of the Act, the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than fair value and that there was likely to be material injury by reason of such sales; and (B) in accordance with section 733(e)(1)(B) of the Act, Hengyang had massive imports during a relatively short period.

### **RECOMMENDATION**

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination of this investigation in the Federal Register.

Agree \_\_\_\_\_

Disagree \_\_\_\_\_

\_\_\_\_\_  
Paul Piquado  
Acting Deputy Assistant Secretary  
for Import Administration

\_\_\_\_\_  
Date

<sup>459</sup> See the Memorandum to John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations from Abdelali Elouaradia, Director, Office 4, "Antidumping Duty Investigation of Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Preliminary affirmative Determination of Critical Circumstances," dated April 21, 2010.